





(24,019)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 339.

GEORGE W. NORTON, AS EXECUTOR AND TRUSTEE OF  
THE ESTATE OF GEORGE W. NORTON, DECEASED,  
APPELLANT,

vs.

ROBERT B. WHITESIDE AND ANDREW J. TALLAS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

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*a* Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1912, of said Court, Before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Arba S. Van Valkenburgh, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,  
*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the fourth day of May, A. D. 1912, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Robert B. Whiteside is Appellant, and George W. Norton, as Executor and Trustee of the Estate of George W. Norton, deceased, is Appellee, which said cause was docketed in said Circuit Court of Appeals as No. 3780, and on the twentieth day of May, A. D. 1912, an additional transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Minnesota was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein George W. Norton as Executor and Trustee of the Estate of George W. Norton, deceased, is Appellant, and Andrew J. Tallas is Appellee, which said cause was docketed in said Circuit Court of Appeals as No. 3787, which said transcripts as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, are in the words and figures following, to-wit:

1 United States Circuit Court, District of Minnesota, Fifth Division. In Equity.

No. 732.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Complainant,

vs.

ROBERT B. WHITESIDE, E. P. ALEXANDER, and ANDREW J. TALLAS, Defendants.

Appearances:

Washburn, Bailey & Mitchell, Duluth, Minnesota, Solicitors for Complainant.



Jaques & Hudson and L. C. Harris, Duluth, Minnesota, Solicitors for Defendant Robert B. Whiteside.

Wilson G. Crosby, Duluth, Minnesota, Solicitor for Defendant E. P. Alexander.

D. G. Cash and J. B. Richards, Duluth, Minnesota, Solicitors for Defendant Andrew J. Tallas.

Pleas Before the Honorable the Judges of the Circuit Court of the United States of America for the District of Minnesota, Fifth Division, of the January Term of said Court, Held in said District, in the Year of Our Lord, A. D. 1911.

DISTRICT OF MINNESOTA,  
*Fifth Division, ss:*

Be It Remembered: That on the 27th day of January, A. D. 1910, came the complainant above named, by Washburn, Bailey & Mitchell, his solicitors and of counsel and filed in the Clerk's office of said Court his Bill of Complaint, in the words and figures following, to-wit:

*(Bill of Complaint.)*

In the Circuit Court of the United States, District of Minnesota, Fifth Division. In Equity.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Plaintiff,

vs.

ROBERT B. WHITESIDE, E. P. ALEXANDER, and ANDREW J. TALLAS, Defendants.

To the Honorable the Judges of the Circuit Court of the United States in and for the District of Minnesota:

2 George W. Norton; As Executor and Trustee of the estate of George W. Norton, Deceased, of the city of Louisville in the State of Kentucky, and a citizen of the state of Kentucky, brings this his bill of complaint against Robert B. Whiteside, E. P. Alexander and Andrew J. Tallas, all of the City of Duluth in the State of Minnesota and all being citizens and inhabitants of the District of Minnesota, Fifth Division, and thereupon your orator complains and says:

1. That the plaintiff is and for many years last past has been a citizen of the state of Kentucky and an inhabitant thereof and a resident of the city of Louisville therein, and that his father, the late George W. Norton, was during his lifetime, and at the time of his death, likewise a resident and citizen of the said state of Kentucky.

2. That the defendants Robert B. Whiteside, E. P. Alexander and Andrew J. Tallas are and for many years last past have been residents and citizens of the State of Minnesota and inhabitants of the District of Minnesota, Fifth Division, residing in the City of Duluth in said state and district.



3. That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum of \$2,000 and arises under the Constitution and laws of the United States.

4. That the plaintiff, as executor and trustee of the estate of George W. Norton, deceased, under the will of said George W. Norton, deceased, and the decrees and orders of the court made with respect thereto, is, and for several years last past has been the owner of the title in fee simple absolute to the following described lands situate in the County of St. Louis and State of Minnesota, to-wit:

Government Lot one (1) in Section Twenty-three (23) and the Northeast quarter of the Northeast quarter of Section Twenty-three (23), and Government Lot Two (2) in Section Twenty-four (24), all in Township Forty-nine (49), North, of Range Fifteen (15) West; and of Lots "A" and "B" in Block Forty-one (41), Lots "C" and "D" in Block Forty (40), Lots "G" and "H" in Block Thirty-seven (37), Lots "I" and "J" in Block Thirty-eight (38), Lots "K", "L", "M" and "N" in Block Forty-two (42) in Hunter & Markell's Grassy Point Addition to Duluth, the same being according to the existing plat thereof as the same is recorded in the office of the Register of Deeds of said St. Louis County, the same being part and parcel of Government Lot one (1) of Section Twenty-four (24) in Township Forty-nine (49) North, of Range Fifteen (15) West, together with all the appurtenances thereunto belonging or in anywise appertaining, including all of the riparian rights incident to the ownership of said lands, which lands abut upon the waters of Lake Superior, that is to say, upon a portion thereof commonly known and designated as St. Louis Bay.

5. That the defendant Robert B. Whiteside is and for many years last past has been the owner of the following described lands situate in the County of Douglas and State of Wisconsin, to-wit:

Lots four (4) and five (5) in Section Nineteen (19) in Township Forty-nine (49) North, of Range Fourteen (14) West; Lots one (1) and two (2) in Section Twenty-four (24); Lots one (1), two (2) and three (3) in Section Twenty-five (25) all in Township forty-nine (49) North, of Range Fifteen (15) West; and also Lot Two (2) in Section Twenty-four (24) in Township Forty-nine (49) North of Range Fifteen (15) West, except that the defendant E. P. Alexander has or claims to have some interest in a small portion of said last named lot, together with such riparian rights as are incidental thereto, said lands in fact abutting upon the waters of Lake Superior, that is to say, on that portion thereof commonly called St. Louis Bay.

6. That all of the lands of the plaintiff and of the defendants, hereinbefore described, were part and parcel of the lands ceded and deeded by the State of Virginia to the United States, lying north and west of the Ohio River, on condition that there should be formed out of it not less than five independent states, and part and parcel of that territory or tract of country formerly known as the Northwest Territory organized under the Ordinance of Congress passed in 1887 for the organization and government thereof, and commonly known and



referred to as "the Ordinance of 1787." That Article IV of said Ordinance contained the following provisions:

"No tax shall be imposed on land the property of the United States and in no case shall non-resident proprietors be taxed [higher] than residents. The navigable waters leading into the Mississippi and St. Lawrence Rivers, and the carrying places between the same shall be common highways and forever free as well to the inhabitants of said Territory as to the citizens of the United States and those of other states that may be admitted into the confederacy, without any tax, impost or duty therefor."

That on the 18th day of May, 1796, Congress passed an act providing for the sale of lands of the United States in the territory northwest of the river Ohio, which included the lands hereinbefore described, section nine of which act provides as follows:

4 "That all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be and remain public highways and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall be common to both."

That subsequently there was formed out of said territory the states of Ohio, Indiana, Michigan, Wisconsin and a portion of the state of Minnesota, and that the Congress of the United States, in the passage of the various enabling acts for the states carved out of said territory, preserved the navigable waters within or bordering upon the same as common highways and extended concurrent jurisdiction to the states bordering thereon.

That in the Enabling Act of Congress of the United States for the formation of a Constitution and State Government in Wisconsin Territory, approved August 6", 1846, the northerly and north-westerly boundary of the future state of Wisconsin was described in part as follows:

"Thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same above the Indian Village, according to Nicollet's map; thence due south to the main branch of the St. Croix River."

That in the Enabling Act passed by the Congress of the United States to authorize the people of the Territory of Minnesota to form a constitution and state government, approved February 26", 1857, the southerly, easterly and northeasterly boundaries of said future state were described as follows:

"Thence east, along the northerly boundary of the state of Iowa to the main channel of the Mississippi River; thence up the main channel of said river, and following the boundary line of the State of Wisconsin, until the same intersects the St. Louis River; thence down said river, to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British Possessions."

And these were the descriptions of the boundaries, so far as given above, embraced in the Constitution under which the said states were formally admitted into the Union.



7. That the lands of the plaintiff and the lands of the defendant hereinabove described, are situated upon the opposite shores of the

5 Bay of St. Louis, which is part and parcel of Lake Superior, being a long body of water, more or less irregular in shape, and constituting the upper arm, beginning or head of Lake Superior, the said waters being now and at all times hereinbefore navigable in fact to points far above the location of these lands, and throughout the season of navigation, since the earliest discovery of the country, the same have been navigated by innumerable craft of varying degrees of tonnage and draught, part and parcel of the commerce carried on on the Great Lakes.

8. That the channel or body of water between the lands of the plaintiff and the lands of the defendants, hereinabove described, is the boundary water between the states of Wisconsin and Minnesota, and throughout the history of the state government of said states, and ever since the [existence] of the said states, has been acquiesced in by them as such, through which the constitutional boundary thereof passes.

That the lands of the defendants are in fact situated upon a large island, the expanse of water to the southward thereof being known as Spirit Lake and to the eastward of said island there is a large bay extending far into the land, known as Pokegama Bay and opening into said St. Louis Bay near the northeasterly end of said island, there being a channel or body of water upon the southeasterly side of said island of varying width and irregular shape, by which said Spirit Lake and said Pokagama Bay are connected.

9. That the St. Louis River referred to in said constitutional boundaries, is a stream that has its source in the Lakes and forests some seventy-five miles northward from the city of Duluth and is for the most part a rapid stream, flowing with great velocity through well defined, and for long distances through natural rock walled banks, down steep declivities and over a rocky bed until its waters form the first falls above the Indian Village, mentioned in the Constitution of said states, which was substantially the location of the Town of Fond du Lac, now part of the city of Duluth, below which its waters become mingled with those of Lake Superior at some point above Spirit Lake. That said St. Louis River is and always has been navigable below the said first falls above the Indian Village, and from the earliest exploration of the country, navigated by multitudinous craft engaged in the navigation of the Great Lakes and the arms thereof and the rivers flowing into the same.

10. That Township Forty-nine (49) Range Fourteen (14), which embraces a portion of the lands of the said defendants, was surveyed by the United States in 1854, the survey and plat thereof being approved on July 17<sup>th</sup> of that year, and Township Forty-nine (49), Range Fifteen (15) was surveyed and platted in 1857 and the plats thereof approved.

That the lands of the plaintiff hereinabove described, were patented by the United States to one Charles Knowlton in 1860, from whom, through various intermediate transfers, this plaintiff derived title.



That Lots four (4) and five (5) of Section Nineteen (19) in Township Forty-nine (49) North, of Range Fourteen (14) and Lot one (1) of Section Twenty-four (24) in Township Forty-nine (49) North, of Range Fifteen (15) West, being part of the lands of the defendants hereinbefore described, were entered in the year 1867 and patented by the United States on June 1<sup>st</sup>, 1868, to the predecessors in interest of the defendant Whiteside; That as to the other lands of the defendants hereinabove described, the same became involved in controversies concerning certain land grant acts of Congress and, although the equitable title thereto had passed from the United States as soon as or even prior to the survey thereof, actual patents therefor upon the conclusion of the controversies were not issued until later periods.

11. That upon the admission of the states of Wisconsin and Minnesota into the Union, *to* title to the beds of the navigable lakes and rivers therein or bordering thereon became vested in them respectively, in their [sover-ign] capacity as states, to the extent of the boundaries of such states, such title being of the character of a [sover-ign] title and not a proprietary one, and held and to be held by such states respectively in trust for the benefit of the public which trust it was not and is not within the power of either of said states to abdicate, alienate or in any manner to impair.

That by virtue of grants and conveyances of the public lands by the United States within the territory of said states in the said Northwest Territory, including the said states of Wisconsin and Minnesota, or either of them, bordering upon streams of lakes navigable in fact, or bordering upon the waters of the Great Lakes or the arms or bays or inlets thereof, such grants extend only to the shores of such waters, with such riparian rights or privileges as are incident to the ownership of shore lands bordering on such bodies of [w-ter]. That the United States retains and has always retained and exercised supervision and control over the navigable waters of

7      the Great Lakes and the arms and bays thereof and the navigable rivers and lakes bordering upon or within the states created in whole or in part out of the said Northwest Territory, to the end that the same shall be forever maintained as public highways for the purpose of navigation and for other public purposes, and has ever maintained and exercised supreme, paramount and absolute control over such navigable waters and the commerce thereon, including the improvements of the channels and harbors thereof in the aid of navigation and commerce, and, acting under Congressional authority, and through the various departments of the government, has conducted vast schemes of improvement of such navigable waters in aid of navigation and commerce and fixed from time to time, in the harbors and along the shores of navigable waters within the boundaries of such states, lines which private owners of shore lands may not, in the exercise of their private rights or in the enjoyment of their shore estates, transcend, all of which rights are vested in the United States, and exercised by it under the Constitution of the United States and preserved to it in the fundamental laws by which said states became admitted into the union of states.



That in the preservation of public rights on such navigable waters, where the same constitute state boundaries, it was the intent of the Federal Government and of the States to forever maintain and preserve the rights of the respective states and the citizens thereof, to have access to the navigable and navigated channels of such boundary waters and among the most ancient and important rights of private owners, incidental to the ownership of the shore lands abutting upon such boundary waters, is the right to wharf out to and have access to the navigable and navigated channel of such waters from such shore lands, and to have connection from such shore lands, throughout the extent thereof, with commerce upon such navigable and navigated part or channel of such waters, subject always to the paramount control over the whole of such waters by the United States.

13. That through the said Bay of St. Louis and through the Duluth and Superior Bay and for some distance out into Lake Superior east of the points of land known as Minnesota and Wisconsin Points, there is a current and the same passed through the waters that separate the lands of the plaintiff from those of the defendants, hereabove described. That the same was exceedingly tortuous, and, in the main, marked the place of deepest water. That there was also such a current through the waters upon the southerly or southeasterly side of the said island on which the [defendants] said lands are situated, which island is known as and sometimes called Big Island, and the navigation thereof was difficult for vessels of deep draft and the commerce of the Great Lakes was much impeded thereby.

14. That subsequent to the survey and disposition of the public lands which the plaintiff and the defendants now own in the townships hereinbefore described, there gradually became formed a small, low, marshy and irregular shaped island in the waters between the said lands of the plaintiff and those of the defendants, which at times since its appearance, has been again and again covered with water, and which from time to time has changed in contour, extent and form. That the same has never been surveyed or platted or disposed of as public land, and which, like other parts of the bed of said waters, is vested in the state or states in which the same is situate and held in trust by the same character of title and for the same purposes as the residue of such bed or subaqueous lands, and no person has or can have any private ownership thereof or control over the same in any manner save such as inhere in the owners of the shore lands abutting upon said waters, over such part thereof as falls within the zone of their respective riparian rights and privileges.

15. That the War Department of the United States Government, under the authority of the Congress of the United States, has from the beginning had charge and supervision of the navigable waters of the United States, including the waters hereinabove described or referred to, and has been charged with the duty, under the authority of Congress, of the improvement and preservation thereof, in the exercise of that paramount control thereof reserved to the United



States. And that said Department has at different times, acting under congressional authority, prescribed lines called dock lines in the said waters along or some distance from the respective shores, beyond which private owners may not encroach with their wharves, landings or other improvements.

16. That under the Act of Congress of September 19", 1890, the War Department of the United States established such dock lines on the Minnesota and Wisconsin sides, through the waters of the upper end of Lake Superior, including the waters at the locus in quo, which were approved December 5", 1894. That such dock line upon the Minnesota side in front of the lands of this plaintiff hereinabove described, extended through the said low, marshy island hereinbefore described, and the said dock line upon the Wisconsin side, in front of the lands of the said defendants, was some distance to the southward of said island.

9 17. That under the Acts of Congress of July 13, 1892, June 3, 1896 and March 3, 1899, the War Department of the United States made careful survey and examination of said waters, re-established dock lines through the same upon both the Minnesota and the Wisconsin sides, the same being at some points nearer and at some points farther from the respective shores than the dock lines previously established, and the same being established with a view to the immediate improvement of a deep water channel through said waters in aid of navigation and commerce.

That the said last established dock line, as the same is in front of the plaintiff's said premises, is substantially and for the most part identical with the one previously established, as above set forth, and such dock line on the Wisconsin side, in front of the defendants' said premises, is at some points further from the shore of defendants' land and at some points nearer to the same, but southerly at all places from said so called marshy island hereinabove described, and from the improved channel in said waters hereinafter referred to.

18. That the map and survey of such harbor or dock lines and of the proposed improvement of the said harbor, including the waters and the channel through the waters between the lands of the plaintiff and the lands of the defendants, were approved by the Secretary of War, under the authority of Congress of the United States, on the 17" day of November, 1899, and that the dock and harbor lines upon the Minnesota side through said waters, in front of the said lands of this plaintiff, extended through the said low, marshy island hereinabove mentioned, and likewise the improved channel through said waters, as proposed by said War Department and shown by said survey and map in pursuance of said Act of Congress, passed through the said island.

19. That the said War Department, under the authority of Congress, including the Acts of Congress hereinbefore mentioned, and with funds appropriated for that purpose, prosecuted the said improvement within said harbor lines and in accordance with the said survey and map improved and deepened the said channel [through] the said waters and between the said harbor lines, the said improved



channel crossing and re-crossing the original course of the deep water channel, but running generally in the same direction and operating in aid of navigation and commerce to deepen and shorten the navigable and navigated channel in said waters between the shores thereof, and in the making of said improvements the

10 said United States Government, acting through the said Department of War thereof and under the Acts of Congress thereof, cut through the said low, marshy island and treated the same as open water or shoal water lands, leaving a small part of said island between the harbor or dock line on the Minnesota side and the shore of the plaintiff's said lands, and the residue thereof between the said deep water channel and the established harbor line on the Wisconsin side, in front of said lands of the defendants.

20. That the defendant Andrew J. Tallas, some time since, without authority of law and without any right whatsoever so to do, entered upon the said low, marshy island and has pretended to occupy the same in some manner and has placed thereon a small shack or cabin under the belief, as this plaintiff has been informed and believes, that such island was government land and with the intent and expectation, as plaintiff is informed and believes, that by so doing he could obtain some rights to the same or to enter and secure the same from the government of the United States or from the State of Minnesota or the state of Wisconsin, but your orator avers that the said defendant Tallas has not now nor has he ever had any right, title or interest or valid claim whatsoever in the said island or any part thereof or in or to any part of the bed of such waters.

21. That in the making of such improvements the Government of the United States has deposited material from its dredging work to the said so called island and has filled up the shallow waters therewith, and that by reason thereof and of the action of the waters in connection therewith, and by reason of the said improvement, that part of the original deep water channel through the said waters in front of plaintiff's lands has become filled up and is no longer navigable, and by reason thereof there is now more land appearing above the water in the locality of the said low, marshy island, than appeared formerly and that part of said island is larger than it formerly was, and the said defendant Tallas has so placed his said cabin that by reason thereof and of the matters and things hereinbefore set forth, he now intervenes between the said improved navigable and navigated channel of the said water and the shore of the plaintiff's said lands and between the said established harbor or dock line on the Minnesota side in front of plaintiff's lands, and the shore of said lands, and therefore is infringing upon the riparian rights and privileges of your orator which are incidental and appurtenant to his said lands and estate and which, therefore, if persisted in, may operate to destroy valuable property rights of the plaintiff.

11 22. That as your orator is informed and believes, the [defendant] Whiteside and the defendant Alexander claim some rights in and to the said low, marshy island as incidental to



their ownership of the lands hereinbefore described, situated upon said Big Island, and claim some rights by reason thereof to that portion of the said so called island lying between the said improved channel and the shore of the plaintiff's lands and lying between the said harbor line on the Minnesota side and the shore of the plaintiff's said lands, but your orator avers that the said defendants have not now, nor have they or either of them ever had, any right, title or interest in or to the said so called island or in or to any of the subaqueous lands in front of their said premises, or any rights whatsoever beyond the shore line of their said lands, save such riparian rights as are incident or appurtenant thereto, among which is the right of access from said premises to the navigable and navigated channel through said waters, such right of access extending over such portion of said island if any, as falls within the zone of such incidental and appurtenant riparian rights and privileges.

23. That the claims of said defendants, if persisted in and sustained, will operate to place the said defendants and their ownership between your orator and his said estate and the improved navigable and navigated channel through said waters, as improved and established by the United States Government, in pursuance of the paramount and absolute authority reserved to it as aforesaid, and thereby depreciate the value of this plaintiff's said estate and deprive him of his incidental rights and privileges appurtenant thereto, which gave to said lands the greater part of their said value. That the conduct and occupancy of Defendant Tallas and the claims of the several defendants as herein set forth, work a cloud upon the plaintiff's said title and estate.

24. That the Congress of the United States, through the enabling acts for the admission of the states carved out of the said Northwest Territory into the Union, preserved the navigable waters as common highways and extended concurrent jurisdiction to the states bordering thereon, and such concurrent jurisdiction has been preserved to the several states over boundary waters by their fundamental laws and as well by legislative enactments and have been exercised thereunder, and that the State of Minnesota, in the exercise of its jurisdiction over the lands along the shores of said waters within said state, extended such jurisdiction out to the established harbor and dock lines and taxed the shore lands with reference to their value as including riparian rights and privileges out to

12 such established dock lines and taxed such rights as property rights separately where by act of the owner thereof they had been disassociated from the shore, and the plaintiff avers, upon information and belief, that the State of Wisconsin has likewise asserted and extended its jurisdiction upon its side of the navigable waters of the Great Lakes, including Lake Superior and the Duluth-Superior harbor and the arms and bays of said lake.

To the end therefore that this plaintiff may have that relief which can only be obtained in a court of equity and that the defendants may answer the premises, but not under oath or affirmation, the benefit whereof is expressly waived by this plaintiff.

Wherefore Your orator prays that it be adjudged and decreed that he is the owner in fee simple, absolute of the premises hereinbefore



in the fourth paragraph of this bill of complaint described, and that the riparian rights and privileges incident thereto and exclusively thereto belonging be adjudged and decreed to extend out to the established harbor or dock lines hereinbefore described as established by the War Department of the United States under the authority of the Congress of the United States and out to the navigable and navigated channel through the said waters as improved and made by the said United States Government in the aid of navigation and commerce, between the harbor lines established therein, free, clear and discharged of any claim on the part of the defendants, or either of them, and that it be adjudged, determined and decreed that neither the defendants nor any of them have any right, title or interest whatsoever in or to any of the subaqueous land lying between the shores of the plaintiff's said land and the said established dock line and the said navigable and navigated channel, nor in or to the so called island or any lands appearing above the surface of the water lying or being between the said established dock or harbor line and the shore of the plaintiff's said land or between the said navigable and navigated channel as improved by the United States Government and the shore of the plaintiff's said land and that the said defendants, by the judgment and decree of the court be forever enjoined and restrained from interfering with or impeding the full enjoyment by this plaintiff, and all persons claiming under him, of any of the riparian rights and privileges now incident to the ownership of his said land, including the full rights of access, wharfage or other improvements which he or those claiming under him may see fit to make, to reach out to the said navigable and navigated channel of the said waters, subject always to the paramount rights of the general government in its exercise of supreme and absolute control over such waters and in the aid of navigation and the

13 control and regulation of commerce, and for such other and further relief as the nature of this case may require and as to your honors may seem meet.

To the end that your orator may obtain the relief to which he is entitled in the premises, he now prays the court to grant due process of subpoena directed to the said defendants Robert B. Whiteside, E. P. Alexander and Andrew J. Tallas, and to each of them, requiring and commanding them to appear herein and answer, but not under oath (the same having been expressly waived) the several allegations in this your orator's bill of complaint, and further to stand to, perform and abide such further order, direction and decree therein as to this Honorable Court may seem meet and as shall seem agreeable to equity and good conscience. Dated January 26", 1910.

GEORGE W. NORTON,

*As Executor and Trustee of the Estate of George  
W. Norton, Deceased, Plaintiff,*

By J. L. WASHBURN, *His Attorney,*

WASHBURN, BAILEY & MITCHELL,  
*Solicitors and of Counsel for the [Plaintiff],*

709 Lonsdale Bldg., Duluth, Minnesota.



*(Subpœna and Marshal's Return.)*

That in accordance with a præcipe duly filed therefor, a Chancery Subpœna was issued in said cause, by said Clerk, which, together with the Marshal's return thereon is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,  
*District of Minnesota, Fifth Division:*

The President of the United States of America to Robert B. White-side, E. P. Alexander, and Andrew J. Tallas, Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States, for the District of Minnesota, on the first Monday of March next, at the City of Duluth, then and there to answer the Bill of Complaint of George W. Newton, as Executor and Trustee of the Estate of George W. Norton, deceased, citizen of the State of Kentucky, filed against you on the 27th day of January, A. D. 1910, hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 27th day of January, 1910.

14 Issued at my office in the City of Duluth, under the seal of said Circuit Court, the day and year last aforesaid.

[SEAL OF SAID COURT.] HENRY D. LANG, *Clerk*,  
By THOS. H. PRESSNELL, *Deputy*.

MEMORANDUM.—The above named defendants to enter their appearance in this suit in the Clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

HENRY D. LANG, *Clerk*,  
By THOS. H. PRESSNELL, *Deputy*.

WASHBURN, BAILEY & MITCHELL,  
*Complainant's Solicitors.*

UNITED STATES OF AMERICA,  
*District of Minnesota, Fifth Division, ss:*

I hereby certify and return that I served the within Chancery Subpœna on the within named Andrew J. Tallas by reading said Chancery Subpœna to him in [*the*] his presence at Duluth & leaving a true copy thereof with him personally in said district, on the 14th day of February A. D. 1910.

WM. H. GRIMSHAW,  
*U. S. Marshal*,  
By GEO. J. MALLORY, *Deputy*.



*Return on Service of Writ.*

UNITED STATES OF AMERICA,  
*District of Minnesota, ss:*

I hereby certify and return that I served the annexed Chancery Subpoena on the therein-named Robert B. Whiteside — E. P. Alexander by handing to and leaving a true and correct copy thereof with each of them Robert B. Whiteside and E. P. Alexander personally at Duluth in said District on the 28th day of January, A. D. 1910.

WM. H. GRIMSHAW,

*U. S. Marshal,*

By FRANK W. TUFTS, *Deputy.*

*(Stipulation Extending Time for Defendant Whiteside to Answer.  
Filed April 9, 1910.)*

It Is Stipulated, by and between the attorneys for the plaintiff and for the defendant Whiteside, in the above entitled action;  
15 that the time within which the defendant Whiteside is to file his answer in the above entitled action is extended to the 11th day of April, 1910, by mutual consent.

Dated April 4th, 1910.

WASHBURN, BAILEY & MITCHELL,

*Attorneys for plaintiff.*

ALFRED JAKUES,

THEO. T. HUDSON, AND

L. C. HARRIS,

*Attorneys for Defendant Robert B. Whiteside.*

*(Answer of Defendant Robert B. Whiteside. Filed April 9, 1910.)*

The Answer of Robert B. Whiteside, One of the Defendants, to the Bill of Complaint of George W. Norton, as Executor and Trustee of the Estate of George W. Norton, Deceased, Complainant in the Above-entitled Action.

This defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception, or otherwise, that can, or may be, had or taken to the many errors, uncertainties and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

1.

That he admits all of the allegations contained in Paragraph 1 of complainant's bill of complaint.

2.

That defendant admits he is a resident and citizen of the [of the] state of Minnesota and is an inhabitant of the District of Minnesota,



Fifth Division, residing in the City of Duluth in said district and state.

## 3.

That defendant admits that the matter in controversy in this cause exceeds in value the sum of \$2,000, exclusive of interest and costs.

## 4.

That defendant has no knowledge or information sufficient to form a belief as to whether complainant is the owner of the premises described in Paragraph 4 of the said bill of complaint, and in this regard leaves complainant to his proof.

## 16

## 5.

Defendant admits that he is now, and for many years last past has been, the owner of the premises described in Paragraph 5 of the complainant's bill of complaint, together with such riparian rights as are incidental thereto, and admits that said premises are located in the County of Douglas and State of Wisconsin, but denies that said premises, or any part thereof, abut on the waters of Lake Superior, but alleges that said premises, and all thereof, abut on the St. Louis river.

## 6.

Defendant admits that all of the lands of the plaintiff and defendant were part and parcel of the lands ceded by the State of Virginia to the United States, and part and parcel of that territory or tract of country formerly known as the Northwest Territory, organized under the ordinance of Congress passed in 1787, and commonly known as the Ordinance of 1787, and that the states of Ohio, Indiana, Illinois, Wisconsin and a part of the State of Minnesota were subsequently formed out of said territory, and admits that by the terms of said Ordinance of 1787 and by the provisions of the enabling acts passed by Congress for the admission of the States of Wisconsin and Minnesota the navigable waters within or bordering on said states were preserved as common highways for the use and benefit of all the people of said states, and of the United States, and admits that, by the terms of said enabling acts, the states of Wisconsin and Minnesota were given concurrent jurisdiction on the navigable streams forming boundaries between the said states, but denies that said states, or either of them, have any jurisdiction, or control, over the title, use or disposition of the lands lying under the waters of said streams, forming a common boundary of said estate, and being within the borders of said states, respectively.

## 7.

Defendant admits that the lands of the plaintiff and this defendant are situate upon the opposite shores of the St. Louis river, which part of said river, at said point is sometimes called Upper St. Louis Bay, and admits that the said river is now, and at all times heretofore had been, navigable for a distance of several miles beyond the loca-



tion of plaintiff's and this defendant's lands, and as far up said river as the Indian Village of Fond du Lac, which village is now a part of the City of Duluth, Minnesota.

But defendant denies that the said St. Louis river, or that part of said river, sometimes called upper St. Louis Bay, is an  
17 arm of or forms any part or parcel of, Lake Superior, except that the said St. Louis river empties into the said Lake Superior through a narrow opening, or natural channel, between Minnesota Point in the State of Minnesota, and Wisconsin Point in the State of Wisconsin.

## 8.

Defendant admits and alleges that the middle of the channel of the said stream between the lands of the plaintiff and this defendant is, and always has been, the boundary line between the said states of Wisconsin and Minnesota.

Defendant further admits that the said lands of defendant are in fact a large island, and that the expanse of water southwesterly therefrom is known as Spirit Lake, and the expanse of water southeasterly therefrom is known as Pokegama Bay, but alleges that said Spirit Lake and said Pokegama Bay are, and always have been, in truth and in fact, parts of and enlargements of said St. Louis river, as is hereinafter more particularly set forth at length.

## 9.

Defendant admits that the said St. Louis River is a stream that has its source in the lakes and forests some seventy five or one hundred miles northerly from said City of Duluth, and is for the most part a rapid stream, flowing with considerable velocity and for a long distance through a country with well defined and precipitous banks, on either side of said river; that from a point at, or near, the Village of New Duluth, Minnesota, which point, by the said river, is a distance of two or three miles beyond the [plaintiff's] and [defendant's] lands herein, and up said stream from said lands, the uplands, on both the Wisconsin and Minnesota sides of said river, recede for a considerable distance from the main channel of the said St. Louis river, leaving a large basin of irregular shape of low, marshy lands, which lands are covered and overflowed by the waters from the said St. Louis river; that, from time to time, different designations have been given to these bodies of water covering the said low, marshy lands, such as Spirit Lake, Pokegama Bay and Upper St. Louis Bay, but alleges that all of said bodies of water are fed by the said St. Louis River and are directly connected with said river at various points, and that they do not receive their waters from any other  
18 source than the St. Louis river, except the small amount of surface water that runs into the said various bodies of water from the adjoining shores, and that the said several bodies of water, so designated as above, do not have any well defined channel, or current, except the current and channel of the said St. Louis River, and that the said bodies of water, and all the bodies of water, covering the said hereinbefore described low, marshy basin, are, in truth



and in fact, nothing but enlargements of said St. Louis River, and are now, in truth and in fact, and at all times have been, part and parcel of said St. Louis River.

That from the point where the said St. Louis River flows between the lands of the plaintiff and this defendant it continues in an easterly course, around Grassy Point, in Minnesota, and under the Northern Pacific railroad bridge, which spans said river and connects the City of Superior, Wisconsin, with the Village of West Duluth, Minnesota, now a part of the said City of Duluth;

That from the point where the said stream is crossed by the said Northern Pacific railroad bridge, the said river flows in a northeasterly direction and passes between Connor's Point, in the State of Wisconsin, and Rice's Point in the State of Minnesota;

That the part of said stream which is located between the said Northern Pacific railroad bridge and said Connor's Point and said Rice's Point is sometimes called the bay of St. Louis;

That from the point where said river passes between the said Connor's Point and the said Rice's Point the waters of said stream extend in a northerly direction for a distance of about two miles, a part of the business portion of the said city of Duluth being situated on the shores of that part of the stream extending northerly from the point where said river passes between said Connor's Point and said Rice's Point, and in recent years said extension of said stream has been called the Bay of Duluth;

That from the point where said stream passes between said Connor's Point and said Rice's Point a portion of said stream extends in a southerly direction for a distance of several miles, and a portion of the City of Superior, Wisconsin, is situated on the shores thereof, and in recent years said part of said stream has been called the Bay of Superior;

That from a point near the southern terminus of the so-called Bay of Superior the waters of the said St. Louis river empty into Lake Superior through a narrow opening, only a few hundred feet  
19 wide, between Wisconsin Point, in the State of Wisconsin and Minnesota Point, in the State of Minnesota;

That easterly of the waters in the said so called Bays of Duluth and Superior a point of land, called Minnesota Point, extends from the mainland in the State of Minnesota to the point where the waters of the said St. Louis river and the waters of the so called bays of St. Louis, Duluth and Superior empty into the said Lake Superior;

That the said Minnesota Point is now, and for a period long prior to the passage of the Enabling Acts of Congress, admitting the States of Wisconsin and Minnesota into the Union was, from six hundred to a thousand feet in width, and covered by trees and timber of great size, and during all of the times hereinbefore mentioned it has never been overflowed by the waters of the said Lake Superior, or the waters of the said St. Louis River, or the so called bays of Duluth and Superior and during all of said times has been capable of inhabitation, and has been inhabited to a greater or less extent for more than fifty years last past;

That the said Minnesota Point and the said Wisconsin Point sep-



arates the waters of Lake Superior from the waters of the said St. Louis river and the so called bays of Duluth and Superior, and the only connection between the two, at any of the times hereinbefore mentioned, was the said natural channel, or opening, where the waters of said river flowed into the said Lake Superior, between the said Wisconsin Point and the said Minnesota Point, with the exception of an artificial channel, or canal, which was cut through the northerly end of said Minnesota Point, near the said City of Duluth, about the year 1871, connecting the waters of the said Bay of Duluth with the waters of the said Lake Superior, and which opening, or canal, has ever since been maintained;

That from the said Indian Village of Fond du Lac and, on down through the so called bays of Upper St. Louis, St. Louis, Duluth and Superior, to the said hereinbefore described point where the said waters empty into the said Lake Superior, there has always been, during all the times hereinbefore mentioned, a well defined current and navigable channel, that said channel is, and, during all the times hereinbefore mentioned was, the main channel of the said St. Louis River, and that the middle of said channel is, and always has been, the boundary line between the said States of Wisconsin and Minnesota.

20

10.

Defendant admits that Township Forty-nine (49) Range Fourteen (14) was surveyed by the United States in 1854, and said Township Forty-nine (49) Range Fifteen (15) was surveyed in 1857, and that said surveys were approved; and admits that the lands of defendant were entered and patented at the dates set forth in Paragraph 10 of plaintiff's bill of complaint, but alleges that he has no knowledge or information sufficient to form a belief as to the allegations regarding the entry and patenting of plaintiff's said lands, and in his behalf leaves plaintiff to his proofs.

11.

Defendant denies that upon the admission of the said State of Wisconsin the title to the beds of the navigable lakes and rivers therein, or bordering thereon, became vested in the said State of Wisconsin, but alleges that, under the laws of the United States and the decisions of the courts thereof, the question of the title to subaqueous lands on navigable streams of water is a purely local question, where the grant to the upland on such streams has been made by the general Government without restriction and without reservation, and further alleges, that, under the laws of the State of Wisconsin, and the decisions of the courts of said state, the title to lands bordering on navigable streams extends to the center of said streams, where said streams do not constitute a part of the boundary of the state, and that in the latter case the title of the upland extends to the middle of the main channel of the stream; and defendant further alleges that by virtue of the laws of the United States, and the said State of Wisconsin, the title to [defendant's] lands, set forth and described in the bill of complaint herein, extend to the middle of the main channel of the said



St. Louis River, as hereinbefore described; but defendant admits that the United States has always retained and exercised supervision and control, for the purposes of navigation, over the navigable streams of Wisconsin and Minnesota, including the improvement of channels and harbors, and the fixing and location of harbor lines.

## 12.

Defendant admits that there is a current in the St. Louis river between the lands of plaintiff and this defendant and that the same passes through the so called bays of St. Louis, Duluth and Superior and out into Lake Superior; that the same is tortuous and, in the main, marks the place of deepest water; and also admits that there is a current, or channel, through the waters on the southerly  
21 and southeasterly side of the [defendant's] land, sometimes called Big Island, but alleges the lands of plaintiff and this defendant, as described in the bill of complaint herein.

## 13.

Defendant admits that, subsequent to the survey and disposition of the public lands which plaintiff and this defendant now own in the townships, in the bill of complaint described, a low marshy, and irregular shaped island gradually formed, between the lands of plaintiff and this defendant, and that the same has changed in form and extent from time to time, and that at times part of the same has been overflowed, but alleges that a large part of said island has, for many years last past, been high and dry, and covered with small trees and vegetation, and that the same is now, and for many years last past has been, a permanent and stable body of land, and, during said last mentioned time, has been habitable;

Defendant further admits that said island has never been surveyed by the government of the United States, but denies that the title to the same is vested in the States, either of Wisconsin or Minnesota, but alleges that the said island lies almost wholly [*wholly*] on the southerly side of the main channel of the said St. Louis River, and that all that portion of said island which lies on the southerly side of said channel is within the limits of the said State of Wisconsin, and further alleges, that, under the laws of the United States, and the laws of the State of Wisconsin, that the title to all that portion of said island, which lies on the southerly side of the main channel of the said St. Louis River is vested in this defendant.

## 14.

Defendant admits that the United States Government has at all times had supervision and control of the navigable waters of the United States, including those described in the bill of complaint herein, and that it has, at different times, prescribed dock lines, beyond which private owners may not encroach with their wharves, or other improvements, in such manner as to obstruct, or interfere with, the navigable portions of said stream.



## 15.

Defendant admits that under the Act of Congress of September 19, 1890, the War Department of the United States established such dock lines, on the Minnesota and Wisconsin sides of the waters between plaintiff's and defendant's lands, which were approved in 1894; and that such dock line upon the Minnesota side and in front of said lands of the plaintiff, extends, in part, through said low, marshy island, hereinbefore referred to, and that said dock line upon the Wisconsin side, in front of the lands of said defendant, is some distance southward of said island.

## 16.

Defendant admits that under the Acts of Congress passed in 1892, 1896 and 1899, the War Department of the United States reestablished dock lines through the said waters, in the bill of complaint described, and that the said dock lines so established on the Wisconsin side, and in front of [defendant's] lands, are at all points southerly of said hereinbefore described low, marshy island, and southerly from the improved channel between the dock lines on the Minnesota and Wisconsin sides.

## 17.

Defendant admits that the map and survey of such dock lines and of the proposed improvement of said harbor, in front of plaintiff's and defendant's said lands, were approved in 1899, and that the said dock line and the said improved channel passed through a portion of said low, marshy island.

## 18.

Defendant admits that the Government of the United States prosecuted the improvement of deepening the channel between the said harbor lines in front of the lands of the plaintiff and defendant, and that said improved channel cut through a part of said low, marshy island, but defendant denies that only a small part of said low marshy island was left between the said dock line on the Minnesota side and the plaintiff's said lands, and alleges that a large part of said low, marshy island was left between said dock line on the Minnesota side and plaintiff's said lands.

## 19.

Defendant admits that in making said improvements the Government has deposited some material from its dredging work on the southerly side of said island, by reason thereof and the action of the waters, a part of the original deep water channel in front of plaintiff's land had been filled up; but defendant alleges that only a small part of the original channel in front of plaintiff's land has been filled up, that the said filling consists of loose sand and that the same could be dredged out in a short time and with very little expense;

And defendant alleges that a large part of said original deep water channel, which is immediately in front of plaintiff's land and un-



23 affected by said artificial channel, heretofore referred to connects directly with said artificial channel at, or near, the easterly side of plaintiff's lands, and affords the said plaintiff's lands, direct access to the said artificial channel.

## 20.

Defendant further alleges that between the said Village of New Duluth, located on said St. Louis River, about two miles above plaintiff's and Defendants' lands, and said Grassy Point in Minnesota, located about two miles below plaintiff's and [defendant's] lands, the waters of said St. Louis River overflow from the main channel of said stream and extend over a low, marshy basin, irregular in shape and several miles in width; that within said basin and surrounded by said waters are several large and several small permanent islands, capable of being used for manufacturing sites, railroad yards, and other business purposes; that the shore line around said basin is very irregular in shape, and, in many places, the said waters from the St. Louis River, overflowing into said natural basin, extend far inland, in the form of indentations and small bays; that such condition has existed for a period long prior to the passage of said enabling acts, admitting the said states of Minnesota and Wisconsin, and that all of said islands, and all of the shore lands, located around said basin, and bordering on the waters of said indentations and small bays, are now, and, for a period long prior to the passage of said enabling acts admitting the State of Minnesota and Wisconsin were, entitled to all the riparian rights and privileges of lands bordering on navigable streams; that the said St. Louis River furnishes water in sufficient volume so that, by the deepening and improvement of artificial channels, all of said islands and all of said shore lands, bordering on said indentations and small bays, can be afforded facilities for shipments by water and be brought into direct communication with the main channel of said St. Louis river;

And defendant further alleges that by reason of the topographical configuration of the country surrounding said basin, and by reason of the great distance of a large part of the shore lands surrounding said basin from the main channel of said St. Louis River, and by reason of the difficulties and conflicts that would arise in an attempt to extend lines from the boundaries of said various tracts of land, bordering on said small bays and indentations and from the boundaries of said various islands situated within said basin, to the main channel of said St. Louis River, and at right angles thereto, so as to afford each of said tracts of land, surrounding said basin, and each of said islands, the natural and proper riparian rights to  
 24 which they are entitled, it would be impracticable to furnish all of said various tracts with facilities for shipments by water, and would be impracticable, and next to impossible, to bring all of said various tracts of land, surrounding said basin, and said islands, into communication with the navigable portion [—] said stream by the improvement, alone, of the main channel of said St. Louis River; and alleges that said various tracts of land, and said islands, can only be afforded the facilities they should have for water



shipments, and can only exercise the natural, riparian rights to which, by law, they are entitled, by the dredging and maintaining of numerous artificial channels, within said basin, so that each and all of said tracts, and said islands, may have direct access to the navigable portions of said stream; and defendant alleges that the Government of the United States has in contemplation the construction of numerous artificial channels, within said basin, so as to afford the various tracts of land, surrounding said basin, and the said islands, access to the navigable portions of said stream, and, to that end, has caused surveys to [b-] made and dock lines to be laid out, with the end in view of extending and dredging out artificial channels, in the future, in such manner, that said various tracts of land, and said islands, may exercise the natural, riparian rights to which they are, by law, entitled.

## 21.

Defendant further alleges that the territory surrounding said basin, and on either side, will be the industrial center of both of the Cities of Duluth, Minnesota, and Superior, Wisconsin, and that there will be a great demand and a great necessity for all of the ground and space that can be made available, in said territory, for the construction of wharves, docks, manufacturing plants, railroad shops and yards, and other industrial enterprises; and, to that end, all the territory in and surrounding said basin, including said islands, and the low lands covered with water and lying between the said numerous artificial channels to be constructed and maintained by the General Government, will be needed, and can be filled in and used as sites for numerous industrial enterprises, without in any manner interfering with the proper navigation of said stream; that, on the Minnesota side of said stream, the amount of ground space available for sites for enterprises that can readily reach the navigable [waters] of said stream is limited in quantity, owing to the fact that a high range of rocky hills, or bluffs, with precipitous sides, runs along the Minnesota shore, and only a comparatively short distance back from the Minnesota shore line, on said stream, leaving only a narrow strip of level land, between said shore line  
25 and the sides of said rocky and precipitous bluffs, available for use for industrial enterprises.

## 22.

That a large part of the said low, marshy island, lying between plaintiff's and defendants' land, and described in the plaintiff's bill of complaint, is located on the southerly side of the original channel of the said St. Louis River, and is in the County of Douglas, and State of Wisconsin; that all of said portion of said low, marshy island, which is on the southerly side of the original channel of said St. Louis River is within the zone of the riparian rights of this defendant's lands, described in the bill of complaint, and that, by the laws of the United States, and the decisions of the courts thereof, and by the laws of the State of Wisconsin, and the decisions of the



Courts thereof, the title to all that portion of said low, marshy island, lying on the Wisconsin side of said stream, is vested in this defendant;

That said portion of said island is now, and for many years last past has been, high and dry, and is a permanent and fixed body of land, consisting of many acres of ground, and that the same is available for, and would be useful in, and is needed for, the location of manufacturing sites and other enterprises;

That said portion of said low, marshy island, herein last above referred to, lies between the said original channel of the said St. Louis River and the artificial channel referred to in plaintiff's bill of complaint; that in the improvement of making said artificial channel the Government cut off and destroyed but a comparatively small portion of said low, marshy island, and left the larger and remaining part thereof as a permanent and fixed body of land; that the improvement of that portion of said island, hereinbefore referred to, by the construction and [maintenance] of manufacturing plants, or other industries, thereon, would not, in any way, interfere with the navigation of either said original channel of the said St. Louis River, or with the navigation of said artificial channel, referred to in plaintiff's bill of complaint; neither would the construction and maintenance of manufacturing plants, or other industries, on said portion of said island, hereinbefore referred to, interfere with the riparian rights of plaintiff's lands, described in the bill of complaint herein, for the reason that said original channel lies between plaintiff's said lands and said portion of said island, and the said original channel, lying immediately in front of the plaintiff's said lands, opens directly and conveniently into said artificial channel, at, or near, the easterly side of plaintiff's  
26 said lands; and defendant further alleges that the said plaintiff's said lands are enjoying, and do now enjoy and have, practically and substantially all the riparian rights and privileges which attached to said lands at the time the same were surveyed and platted, and at the time the same were patented by the Government to plaintiff's predecessors.

23.

Defendant further alleges that all of the said premises described in plaintiff's bill of complaint, as belonging to this defendant, are located in the county of Douglas and State of Wisconsin; that all of the subaqueous lands, lying between the limits of defendant's said lands and the middle of the main, original, channel of said St. Louis River, are located in the said County of Douglas, and State of Wisconsin; that by virtue of the laws of the United States, and the decisions of the courts thereof, and the laws of the State of Wisconsin, and the decisions of the courts thereof, the title to the subaqueous lands, so hereinbefore last described, is vested in this defendant; that a large part of the lands, to which plaintiff in this action seeks to have title quieted in himself, are located in the said County of Douglas, and State of Wisconsin, and that this Honorable Court has no jurisdiction thereof, or control thereover, and that



plaintiff has no right, title, or interest, in and to any of the subaqueous lands, lying on the southerly side of the main, original channel of said St. Louis River, and being within the said County of Douglas, and State of Wisconsin.

And this defendant denies all and all manner of unlawful combination and confederacy where it is by the said bill charged; without this, if there is any other matter, cause or thing in said complainant's bill of complaint contained material or necessary for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of this defendant, all which said matters and things this defendant is ready and willing to answer, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

ROBERT B. WHITESIDE.

ALFRED JAQUES,  
THEO T. HUDSON, AND  
L. C. HARRIS,

*Solicitors and of Counsel for Defendant*

*Robert B. Whiteside, 411 Lonsdale Bldg.,  
Duluth, Minn.*

27 STATE OF MINNESOTA,  
County of St. Louis, ss:

Robert B. Whiteside being first duly sworn, deposes and says: that he is the defendant mentioned in the foregoing answer, and has read the same and knows the contents thereof, that the same is true of his own knowledge, except as, to those matters therein stated on information and belief, and as to them he believes them to be true.

ROBERT B. WHITESIDE.

Subscribed and sworn to before me this 8th day of April, A. D. 1910.

[NOTARIAL SEAL.]

ALFRED JAQUES,  
*Notary Public, St. Louis County, Minn.*

My Com. Expires July 1, 1913.

*(Answer of Defendant Andrew J. Tallas. Filed April 9, 1910.)*

Answer of Andrew J. Tallas to the Bill of Complaint of George W. Norton as Executor and Trustee, Complainant Herein.

This defendant, now and at all times saving and reserving unto himself all benefit and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:



1. This defendant admits upon information and belief that the plaintiff George W. Norton is a resident and citizen of the State of Kentucky; and that the defendant- Robert B. Whiteside and E. P. Alexander are residents and citizens of the State of Minnesota; but denies that this defendant is a resident or citizen of the State of Minnesota; and avers and charges the fact to be that this defendant Andrew J. Tallas is now, and for more than twenty years last past has been, a resident and citizen of the State of Wisconsin.

2. And further answering this defendant admits that the matter in dispute in this cause exceeds the sum of \$2,000.00 exclusive of interest and costs.

3. This defendant does not know and has not been informed save by said bill of complaint whether the plaintiff as executor  
28 and trustee of the estate of George W. Norton deceased is the owner of the lands described in subdivision numbered 4, of said bill of complaint; but denies that said lands or any part thereof abut upon the waters of Lake Superior, or upon a [protion] thereof commonly known or designated as St. Louis Bay; and denies that what is (or ever has been) commonly known and designated as said St. Louis Bay is a portion of said Lake Superior; and avers and charges the fact to be that said St. Louis Bay is a part of the St. Louis River and a mere enlargement thereof; and further avers and charges the fact to be that the said described lands abut on the St. Louis River, at a point a considerable distance above said St. Louis Bay; and further avers and charges the fact to be that the said lands described in said subdivision numbered 4 of the bill of complaint do not constitute or comprise all of that part of said Government Lot one (1) of Section 24, in Township 49 North of Range 15 West which abuts upon the waters of said St. Louis River; and further avers and charges the fact to be that several separate and distinct lots or parcels of said Hunter & Markell's Grassy Point Addition to Duluth which abut upon the waters of said St. Louis River between the exterior lines of said Government Lot one (1), are owned in fee by persons other than said Complainant who are not made parties to this suit, and that without ascertaining the names of such parties, the parcels owned by them respectively, and their respective rights and claims, it will be impracticable for the court to definitely determine and finally dispose of the matters in controversy in this suit.

4. And further answering this defendant avers that he does not know and has not been informed save by said bill of complaint as to the ownership of the lands described in subdivision numbered 5 of said bill of complaint; and therefore requires strict proof of the same.

5. And this defendant admits upon information and belief all the matters and things set out in subdivision numbered 6 in said bill of complaint.

6. And further answering this defendant admits that the lands alleged to belong to the complainant in subdivision 4 of the said bill, and the lands alleged to belong to the defendants Whiteside and Alexander in subdivision 5 of said bill, are situated upon the opposite shores of said St. Louis River but denies that any of said



lands are situate on the shore of the Bay of St. Louis; and denies that said Bay of St. Louis is part or parcel of Lake Superior; but avers and charges the fact to be that the said Bay of St. Louis commences at the easterly side of Grassy Point in the State of Minnesota, and extends in a northeasterly direction to Rice's Point in the State of Minnesota and Connor's Point in the State of Wisconsin, and no further, and is a mere enlargement of said St. Louis River, and that said St. Louis River after contracting and passing between said Rice's and Connor's Points again enlarges into what is known and called Superior Bay, and finally empties into Lake Superior between Minnesota Point in the State of Minnesota and Wisconsin Point in the State of Wisconsin; and this defendant admits that the waters of said St. Louis River have for many years been navigated for logs and small craft from the mouth thereof between said Minnesota and Wisconsin Points, to a considerable distance above the lands described in said bill of complaint; but denies that such navigation was ever in any proper sense part and parcel of the commerce carried on on the Great Lakes; and further avers and charges the fact to be, that only the smaller boats and vessels actually engaged in navigating the Great Lakes have ever been able to navigate the waters of said St. Louis River above the lands described in said bill of complaint and have been able to navigate said waters only by reason of the artificial improvement of the natural channel of said River by dredging at the expense of the Government of the United States.

7. And further answer- to said bill this defendant avers that the center line of the main natural channel of said St. Louis River as it existed August 6th 1846, the date of the approval of an Act of the Congress of the United States entitled, "An Act to enable the people of Wisconsin Territory to form a Constitution and State Government, and for the admission of such State into the Union," with such changes in the course of said channel as have since occurred from natural causes, was and is the boundary line of the States of Minnesota and Wisconsin between the lands of the plaintiff and the lands of the defendants; and admits that the center of said main channel has been [acqu-essed] in the States of Wisconsin and Minnesota throughout their history and [existence] as the boundary line between said States at the locality where the said lands of plaintiff and defendants are situate.

And further answering this defendant avers and charges the fact to be that the large island, on which the lands of the defendants Whiteside and Alexander are situate, is bounded entirely by the waters of the said St. Louis River, but that the channel [orr] body of water on the southeasterly side of said large island is narrow, tortuous and very shallow in places, and has seldom been used except by row boats and other very small craft, and does not connect the waters of said Spirit Lake and Pokegama Bay, mentioned in said bill of complaint, except as it may be said to afford a passage for very small craft from said Pokegama Bay to said Spirit Lake and vice versa, after crossing the main channel of said St. Louis River; and this defendant, except as qualified by the aver-



ments contained in this subdivision number 7 of his answer, denies all the allegations contained in subdivision 8 of said bill of complaint.

8. And further answering this defendant admits the allegations contained in the first part of subdivision 9 of said bill of complaint, from the commencement of said subdivision down to the words, "The location of the Town of Fond du Lac, now part of the City of Duluth"; but denies that the waters of said St. Louis River become mingled with the waters of Lake Superior at any point above said Spirit Lake; and avers and charges the fact to be that the waters of said St. Louis River do not mingle with the waters of Lake Superior, until said River empties into Lake Superior after flowing between said Wisconsin Point and said Minnesota Point; and denies that said St. Louis River always has been or is navigable below said first falls above said Indian Village or Fond du Lac, except in a limited sense for logs and small craft; and denies that from earliest explorations of the country the said River has been navigated by multitudinous craft engaged in the navigation of the Great Lakes; and avers and charges the fact to be that only certain portions and enlargements of said River, namely Superior Bay and St. Louis Bay, are so navigable for the ordinary craft engaged in navigation on the Great Lakes; and that above the lands of plaintiff and defendants mentioned in said bill of complaint, said River is navigated only to a very limited extent by the smallest class of vessels engaged in actual commerce on the Great Lakes, and that only after extensive artificial improvements of the natural channel by the United States Government.

9. And further answering this defendant says that he does not know, and has not been informed save by the said bill of complaint as to any of the matters and things set forth in subdivision 10 of said bill, and therefore requires strict proof of the same.

10. And further answering, this defendant admits all of the allegations contained in subdivision numbered 11 of said bill of complaint except the allegations contained in the last paragraph of said subdivision 11, commencing with the words "That in the preservation of public rights on such navigable waters," and ending with the words, "Subject always to the paramount control of such waters by the United States," and this defendant denies each and every the allegations contained in said last paragraph of said subdivision 11, and requires strict proof of the same.

11. And further answering this defendant admits the allegations contained in subdivision numbered 13 of said bill of complaint, except that this defendant avers and charges the fact to be that the current mentioned in said subdivision 13 as passing "through the waters that separate the lands of the plaintiff and those of the defendants," is the natural current made by said St. Louis River in discharging into Lake Superior the waters collected in its course, from its source to its mouth between said Minnesota and Wisconsin Points.

12. And further answering this defendant denies each and every allegation contained in subdivision numbered 14 of said bill of complaint save as the same are hereinafter qualified, or specifically admitted. And further answering this defendant avers and charges



the fact to be that the island mentioned in said subdivision 14 of the bill of complaint is situate on the Wisconsin side of said boundary line between said State and the State of Minnesota and the same was in [existence] at the time of the survey and disposition of the public lands now claimed to be owned by the plaintiff and the defendants Whiteside and Alexander respectively; but the same was not meandered or numbered as a Government subdivision or lot, but was left appurtenant to the main land abutting on the waters of St. Louis River in the State of Wisconsin, and the main channel of the said St. Louis River has always flowed between said island and the said lands claimed by plaintiff on the Minnesota shore of said St. Louis River. That his defendant by himself and predecessor hereinafter mentioned has been in the possession of said island since the month of August of the year 1887 claiming title thereto, and such possession and claim of title has never been disturbed or questioned by anyone save by the commencement of a suit in ejectment in the Superior Court of Douglas County, State of Wisconsin wherein said defendant Robert B. Whiteside is plaintiff, and this defendant Andrew J. Gallas is defendant which said suit is still pending in said Court.

13. And further answering to said bill of complaint this defendant admits the allegations contained in subdivision 15 of said bill. And further answering this defendant avers that under the Act of Congress of September 19, 1890, the War Department of the United States established Dock lines through certain waters of said St. Louis River, which were approved December 5th 1894; and that at the locus in quo such dock lines were established on the Wisconsin side of the said main channel of the St. Louis River, and that the northerly dock line so established cuts through a small portion of that part of said island which has accrued by natural accretions since this defendant first took possession of the same as aforesaid. And this defendant further avers and charges the fact to be that the original boundary line between the States of Wisconsin and Minnesota has never been changed; and that no dock line has yet been established on the Minnesota [—] of the said main channel of the said St. Louis River at the locus in quo; and except as herein averred and charged this defendant denies each and every allegation contained in subdivision 16 of said bill of complaint.

14. And further answering this defendant admits that under the Acts of Congress July 13th 1892, June 3rd 1896, and March 3rd, 1899, the War Department of the United States made a resurvey and re-established dock lines in the waters of said St. Louis River; but avers that at the locus in quo, all of said dock lines were established on the southerly or Wisconsin side of the main channel of said St. Louis River, and did not materially change the former dock line in front of this defendant's said island, and did not establish a dock line on the northerly or Minnesota side of said main channel; and that the boundary line between the said States of Minnesota and Wisconsin at the locus in quo, has never been changed or in any way modified since the admission of the State of Minnesota into the Union; and that except as herein averred or expressly admitted



this defendant denies each and every allegation contained in subdivision 17 of the bill of complaint.

15. And further answering this defendant admits that the map and survey of the said waters of St. Louis River so made as aforesaid were duly approved by the Secretary of War on the 17th day of November 1899; and admits that the northerly dock line at the locus in quo, as well as the proposed artificial channel provided for in said survey, cut off or passed through a small portion of this defendant's said island; but avers that the part of said island through which said dock line and proposed artificial channel so passed, was a part of said island which had been gradually added to the same by accretions accruing subsequent to the time when this defendant took possession of said lands as [*aforeusually*] added to the same by accretions accruing subsequent to the time when this defendant took possession of said island as aforesaid; and except as herein admitted or averred this defendant denies each and every allegation contained in subdivision 18 of said bill of complaint.

16. And further answering this defendant avers and charges the fact to be, that the only part of said island that was cut off or  
33     disturbed by reason of the making of the said new channel by the United States Government as mentioned in subdivision 19 of said bill of complaint, was a small portion of that part of said island which had been added to said original island by natural accretions accruing subsequent to the time when this defendant took possession of the same as aforesaid; and except as herein otherwise averred this defendant admits the allegations contained in subdivision 19 of said bill of complaint.

17. And further answering to said bill of complaint, and to subdivision 20 thereof, this defendant avers and charges the fact to be, that the island mentioned in said subdivision is situate in the State of Wisconsin, and that in the year 1887, and in or about the month of August of that year, one Albert Swenson went upon the said island with the intention of claiming title thereto and built a house thereon and placed this defendant in possession of said house and island as his tenant, and from that time on until the sale of said premises to this defendant as hereinafter mentioned said Swenson was in the open, notorious, continuous, exclusive and hostile possession of said island and of the whole thereof, claiming title thereto, and that said Swenson duly sold, assigned and conveyed to this defendant the said island and all his right, title and interest therein, and surrendered possession of the same to this defendant without break in the continuity of such possession and from thence on to the present time this defendant has remained in continuous, notorious, open, hostile and exclusive possession thereof in his own right claiming title to the same as against all the world, and has made it his home winter and summer and through all the seasons for more than twenty-two years prior to the commencement of this suit; and during all that time has had no other home or residence, and during all said time his claim of title has never been disputed by any one except as averred in subdivision 12 of this answer. And except as herein averred denies each and every allegation contained in subdivision 20 of said bill of complaint. And this defendant alleges that he is the



owner in fee of said island, and of all riparian rights appertaining thereto.

18. And further answering to said bill of complaint and to subdivision 21 thereof, this defendant avers and charges the fact to be, that at the time he took possession of said island and erected his dwelling thereon the main and only channel of said St. Louis River,

the center thread of which channel was the boundary line between the States of Minnesota and Wisconsin, passed very close to the Minnesota shore at the locus in quo and flowed between the said lands claimed by plaintiff and the said island of this defendant; and said plaintiff at the time this defendant took possession of said island as aforesaid had no rights, riparian or otherwise beyond the Minnesota side of said channel, and never to the knowledge of this defendant made any claim that his riparian rights extended across said main channel and into the territory of Wisconsin; and never made any claim to this defendant that he had any right in or to the island so occupied and held by this defendant, nor disputed this defendant's claim of title to, or possession of said island. And this defendant avers and charges the fact to be that said boundary line between the States of Minnesota and Wisconsin still remains where it was at the time this defendant took possession of said island and erected his dwelling thereon; and that defendant has no right riparian or otherwise on the southerly or Wisconsin side of said boundary line. And except as herein averred or admitted this defendant denies each and every allegation contained in all that part of said subdivision 21 of said bill of complaint, commencing with the words "And the said Defendant Tallas has so placed his cabin," occurring about the middle of said subdivision, down to the end thereof.

19. And further answering to said bill this defendant admits all of the allegations contained in subdivision 22 of said bill of complaint, except so much thereof as refers to the said island of this defendant; and avers and charges the fact to be that neither the defendant Whiteside nor the defendant Alexander, have any right or claim, riparian or otherwise to this defendant's said island or to any part thereof.

20. And further answering said bill this defendant admits all the first part of said subdivision 23 thereof down to and including the words "In pursuance of the paramount and absolute authority reserved to it as aforesaid"; but denies each and every allegation contained in the remaining portion of said subdivision; and denies that the plaintiff has ever had any estate right or privilege, riparian or otherwise on the southerly or Wisconsin side of said boundary line at the locus in quo which could be affected or clouded by the alleged acts, conduct or occupancy of the defendants or any of them.

21. And further answering said bill of complaint, this defendant denies that the State of Minnesota has the power to tax, or has ever attempted to tax, riparian or other rights in the State of Wisconsin on the pretense that they are appurtenant to and give value to lands situate in the State of Minnesota, or otherwise, and except

as herein qualified and denied this defendant admits the allegations contained in subdivision 24 of said bill of complaint.



Wherefore this defendant prays that he may be adjudged and decreed to be the absolute owner in fee of the said island, and the whole thereof, so possessed by him; and that the plaintiff and the defendants Robert B. Whiteside and E. P. Alexander be adjudged and decreed to have no estate, right, interest, claim or demand therein; and for such other and further relief as to the Court shall seem meet, and that he be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

Dated April 8th, 1910.

DAN'L G. CASH AND  
J. B. RICHARDS,

*Solicitors and Counsel for Defendant Andrew J.  
Tallas, 410 Manhattan Building, Duluth, Minn.*

*(Replication to Answer of Robert B. Whiteside, Filed May 2, 1910.)*

The Replication of the Above Named Plaintiff to the Answer of the Above Named Defendant, Robert B. Whiteside.

This replicant, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto saith:

That all of the matters and things set forth in said answer in any wise material to the issue, which were at variance or in conflict with the allegations of the plaintiff's bill of complaint herein, are untrue, and further saith that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this replicant is ready  
36 to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by his said bill he has already prayed.

Dated May 2, 1910.

WASHBURN, BAILEY & MITCHELL,  
*Solicitors for Plaintiff, Alworth Bldg., Duluth, Minnesota.*

GEORGE W. NORTON,  
By J. L. WASHBURN,  
*His Attorney.*

STATE OF MINNESOTA,  
*County of St. Louis, ss: .*

J. L. Washburn being first duly sworn deposes and says that he is one of the Solicitors for the plaintiff in the above entitled cause; that he has read the foregoing replication and knows the contents thereof



and that the same is true to the best of his knowledge, information and belief and that the reason this verification is not made by the plaintiff in person is that the said plaintiff is not within the said County of St. Louis or State of Minnesota, wherein resides affiant, said solicitor.

J. L. WASHBURN.

Subscribed and sworn to before me this 2<sup>nd</sup> day of May, 1910.

[NOTARIAL SEAL.]

C. M. VAN NORMAN,  
Notary Public, St. Louis Co., Minn.

My Commission expires Nov. 12, 1915.

*(Replication to Answer of Andrew J. Tallas. Filed May 2, 1910.)*

The Replication of the Above Named Plaintiff to the Answer of the Above Named Defendant Andrew J. Tallas.

This replicant, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto saith:

That all of the matters and things set forth in the said answer, in anywise material to the issue, which are at variance or in conflict with the allegations of the plaintiff's bill of complaint herein, are untrue, except as to the pendency of litigation between the defendants, and further saith that he does and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant, without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true:

This replicant denies that the defendant Tallas, either by himself or by himself and his alleged predecessor Albert Swenson, has been in possession of the said island mentioned in the bill of complaint and in said answer, as alleged in the twelfth and seventeenth subdivisions of said answer, for the period of twenty-two years, or otherwise, save and except as alleged in the bill of complaint herein, and avers that whatever occupancy or possession to the defendant Tallas has had of the same, or any part thereof, has not been of the character alleged in the said paragraphs, or of any such character or for any such period of time as by the laws of either the State of Wisconsin or the State of Minnesota, in force or applicable to the said premises or parties, would or could ripen into any valid claim of title whatsoever to the said island or any part thereof, and this replicant further saith that such occupancy by the said defendant as infringes upon and is hostile to the riparian rights and privileges of this replicant, as alleged in the bill of complaint herein, has not ex-



tended for a period of ten years prior to the filing of said bill of complaint, and denies that the defendant Tallas or his alleged predecessor Swenson have [nor] ever have had any right or title whatsoever in or to the said island or any part thereof, all of which matters and things this replicant is ready to aver, maintain and prove, as this Honorable court shall direct, and humbly prays as in his said bill he has already prayed.

WASHBURN, BAILEY & MITCHELL,  
*Solicitors for Plaintiff, Alworth Bldg., Duluth, Minnesota.*

Dated May 2, 1910.

GEORGE W. NORTON,  
*As Executor and Trustee, &c.,*  
By J. L. WASHBURN,  
*His Attorney.*

STATE OF MINNESOTA,  
*County of St. Louis, ss:*

J. L. Washburn being duly sworn says that he is one of the solicitors for the plaintiff in the above entitled action; that he has read the foregoing replication and knows the contents thereof and that the same is true to the best of his knowledge, information  
38 and belief and that the reason this verification is not made by the plaintiff personally, is that said plaintiff is not within the County of St. Louis and State of Minnesota, wherein resides this affiant, said solicitor.

J. L. WASHBURN.

Subscribed and sworn to before me this 2<sup>nd</sup> day of May, 1910.  
[NOTARIAL SEAL.] C. M. VAN NORMAN,  
*Notary Public, St. Louis Co., Minn.*

My Commission expires Nov. 12, 1915.

*(Stipulation and Order as to Time of Hearing Cause.)*

That thereafter, to-wit: on the 21st day of October, A. D. 1912, came the complainant, by his solicitors, and filed in the Clerk's office of said Court a Stipulation and Order of the Court thereon, in the words and figures following, to-wit:

It Is Stipulated, By and between the parties to the above entitled action:

1. That said cause be placed upon the calendar of said court for the term now pending.
2. That the record be made up by the clerk in accordance with the practice.
3. That the cause be set down by the Court for submission and argument at any date in November 1910, after the 25th of said month.



4. That the court may make its order accordingly.  
Dated October 19<sup>th</sup>, 1910.

WASHBURN, BAILEY & MITCHELL,  
*Solicitors for Plaintiff.*

L. C. HARRIS,  
JAQUES & HUDSON,  
*Solicitors for Defendant Whiteside.*

WILSON G. CROSBY,  
*Solicitor for Defendant Alexander.*

DAN'L G. CASH &  
J. B. RICHARDS,  
*Solicitors for Defendant Tallas.*

39 Upon the foregoing stipulation, It Is Ordered:  
That the above entitled cause be placed upon the calendar of the pending term of said court, the record thereof made by the clerk and that said cause be brought on for submission and argument on the 28th day of November, 1910, at ten o'clock A. M.

Let this order be entered accordingly.

By the Court,

PAGE MORRIS, *Judge.*

Dated October 19th, 1910.

*(Order, Nov. 28, 1910, Postponing Hearing of Cause.)*

This cause being regularly called for hearing in Equity pursuant to the former order of the Court, all the parties appear by their respective solicitors, Messrs. Washburn, Bailey & Mitchell appearing on behalf of the complainant, Messrs. Jaques & Hudson appearing on behalf of defendant Whiteside, and Messrs. D. G. Cash and J. B. Richards appearing on behalf of the defendant Tallas. Whereupon, J. L. Washburn, Esq., of counsel for the complainant and solicitors for the defendant Tallas state that they are ready to proceed with the hearing at this time, but it appearing from a statement made by Mr. Washburn that L. C. Harris, Esq., of counsel for defendant Whiteside is sick and could not be present at this time, and upon motion of Messrs. Jaques & Hudson, of counsel for defendant Whiteside, solicitors for the complainant and defendant Tallas consenting thereto, it is, by the Court

Ordered: That said hearing be and the same hereby is postponed and continued until Monday morning, the 26th day of December, A. D. 1910, at ten o'clock.

*(Term Minute Entries of Proceedings at Hearing.)*

Friday, January 6, 1911.

This cause coming on for hearing in Equity at this time, by stipulation of all the parties hereto and the order of the Court, all the parties appear by their respective solicitors, Messrs. Washburn,



Bailey & Mitchell appearing on behalf of the complainant, Messrs. Jacques & Hudson and L. C. Harris, Esq., appear on behalf of defendant R. B. Whiteside, S. T. Harrison, Esq., appearing on behalf of defendant E. P. Alexander, and Messrs. Daniel G. Cash and J. B. Richards appearing on behalf of defendant Andrew J. Tallas.

Whereupon proceedings are had therein as follows, to-wit:

40 Counsel for defendant Tallas in open Court entered an objection to the jurisdiction of the Court, sitting in equity, on the ground that in view of the pleadings and the proof in the record it is shown that defendant Tallas was at the commencement of this action, and ever since has been and is now in possession and claiming exclusive ownership of the island, specified in the pleadings. That jurisdiction is barred by Sec. 723 R. S. of U. S. and by the Seventh Amendment to the Constitution of the United States because plaintiff has a plain, adequate and complete remedy at law, viz: by ejectment suit at law, and moved that the Court dismiss the plaintiff's bill as to said defendant Tallas upon the grounds above stated.

Argument upon said objection and motion was deferred by consent and to be considered by counsel as reached in the order of their arguments.

J. L. Washburn, Esq., opens the case to the Court on behalf of the complainant, and his argument not being [concluded] at the hour of adjournment, it is, by the Court

Ordered: That further proceedings herein be, and they hereby are postponed and continued until tomorrow morning at ten o'clock.

Saturday, January 7, 1911.

This day come again the parties to said cause, by their respective solicitors, and further proceedings are had therein as follows, to-wit:

J. L. Washburn, Esq., resumes his argument on behalf of the complainant.

And said argument not being concluded at the hour of adjournment, it is, by the Court

Ordered: That further proceedings herein be, and they hereby are postponed and continued until Monday morning, at ten o'clock.

Monday, January 9, 1911.

This day come again the parties to said cause, by their respective solicitors, and further proceedings are had therein as follows, to-wit:

J. L. Washburn, Esq., resumes and concludes his argument on behalf of the complainant.

Upon the motion of J. L. Washburn, Esq., solicitor for the Complainant, solicitors for the defendants consenting thereto, it is, by the Court

41 Ordered: That the Clerk of this Court place said cause upon the Equity Calendar for the January, A. D. 1911, term of this Court; and that further proceedings herein be, and they hereby are postponed and continued until such time as may hereafter be agreed upon by Court and Counsel.



Friday, January 27, 1911.

It having heretofore been agreed between the Court and Counsel for the respective parties that the further hearing in Equity in said cause be set for Monday, January 30, 1911, it is now, upon motion of solicitors for the complainant, solicitors for defendants consenting thereto, [*it is,*] by the Court

Ordered: That said hearing be, and the same hereby is further postponed and continued until Wednesday morning, February 1, A. D. 1911, at ten o'clock.

Wednesday, February 1st, 1911.

Owing to his illness, it is, by the Court

Ordered: That the hearing in equity in said cause, heretofore continued to this time be, and the same hereby is postponed and continued to Thursday, the 2nd day of February, A. D. 1911, at ten o'clock in the forenoon.

Thursday, February 2nd, 1911.

No. 732. In Equity.

GEORGE W. NORTON, as Executor and Trustee, etc.,  
vs.

R. B. WHITESIDE et al.

This cause coming on to be heard, in Equity, all the parties appear by their respective solicitors, Messrs. Washburn, Bailey & Mitchell appearing on behalf of the complainant, Messrs. Jacques & Hudson and L. C. Harris, Esq., appearing on behalf of the defendant Whiteside, and D. G. Cash and J. B. Richards appear on behalf of the defendant Tallas; whereupon, further proceedings are had therein as follows, to-wit:

A. Jacques and L. C. Harris, Esqs., state and argue the case on behalf of the defendant R. B. Whiteside.

And said argument not being concluded at the hour of adjournment, it is, by the Court

Ordered: That further proceedings herein be, and the same hereby are postponed and continued until tomorrow morning at ten o'clock.

42

Friday, February 3d, 1911.

This day come again the parties to the above entitled cause, by their respective solicitors, and further proceedings are had therein as follows, to-wit:

L. C. Harris, Esq., resumes and concludes his argument on behalf of the defendant R. B. Whiteside.

J. B. Richards, Esq., argues the matter on behalf of defendant Andrew J. Tallas.

And the argument in said cause not being concluded at the hour of adjournment it is, by the Court



Ordered: That further proceedings herein be, and the same hereby are postponed and continued until tomorrow morning at ten o'clock.

Saturday, February 4th, 1911.

This day come again the parties to said cause, by their respective solicitors, and further proceedings are had therein as follows, to-wit:

J. B. Richards, Esq., resumes his argument on behalf of defendant Andrew J. Tallas.

And said hearing not being concluded at the hour of adjournment it is, by the Court

Ordered: That further proceedings herein be, and the same hereby are postponed and continued until Monday morning, at ten o'clock.

Monday, February 6th, 1911.

This day come again the parties to said cause, by their respective solicitors, and further proceedings are had therein as follows, to-wit:

J. B. Richards, Esq., resumes and concludes his argument on behalf of defendant Tallas.

And said hearing not being concluded at the hour of adjournment it is, by the Court

Ordered: That further proceedings herein be, and the same hereby are postponed and continued until tomorrow morning at ten o'clock.

Tuesday, February 7, 1911.

This day come again the parties to said cause, by their respective solicitors, and further proceedings are had therein as follows, to-wit:

43 J. L. Washburn, Esq., argues in reply on behalf of complainant.

L. C. Harris, Esq., argues in reply on behalf of defendant Whiteside.

And here the arguments are closed and the case is closed, and the Court having heard the evidence and the arguments of the respective counsel, being fully informed in the premises, after mature deliberation, renders an oral decision in favor of the complainant as to his contentions against [defendant] Whiteside, [an-] dismisses the bill as against defendant Tallas for want of equity; and directs that solicitors for complainant [to] prepare a decree accordingly and submit the same for the consideration of the Court.

*(Report of Special Master.)*

Taking of testimony in the above entitled matter was begun in the Board Room on the 12th floor of the Alworth Building, on July 11th, 1910, at 10 o'clock A. M. before the Honorable Henry F. Greene Special Examiner.

Messrs. Washburn, Bailey and Mitchell appeared for the Plaintiff, Messrs. Jaques and Hudson and Luther C. Harris appeared for the Defendant Whiteside, Messrs. Daniel G. Cash and J. B. Richards



appeared for the Defendant Tallas and Wilson G. Crosby appeared for the Defendant E. P. Alexander.

Mr. WASHBURN, Counsel for Plaintiff: I will first offer in Evidence the following stipulation marked Plaintiff's Exhibit 1, for the purposes of rendering more specific the stipulation of facts, Exhibit 1, and also at the request of Counsel for defendant Alexander, I offer in evidence a deed from Marshall M. Gillman and others to Edward P. Alexander, dated September 1st, 1909, and recorded in the office of the Register of Deeds for Douglas County, Wisconsin, on the 13th day of January, 1910, in Book 109 of Deeds on page 66, being number 179857, and ask to have the same marked Exhibit 2.

I offer in evidence the lithograph copy, with the certificate and notes thereon, of the Government map and survey of Township No. 49, Range 14, in the State of Wisconsin, and ask to have it marked Plaintiff's Exhibit 3.

I offer in evidence Lithograph copy of Government map and survey of Township 49 Range 15, with the notes and certificates thereon, in the state of Wisconsin, and ask to have it marked Plaintiff's Exhibit 4.

44 I offer in evidence a printed or lithographed copy of Government map or plat of Township 49 Range 15, in State of Minnesota, and ask to have it marked Plaintiff's Exhibit 5.

I offer in evidence printed or lithographed copy of the map of the Duluth side of the Duluth and Superior Harbor, together with all of the data shown thereon, being approved by the Department of War on November 17th, 1899, and ask to have it marked Plaintiff's Exhibit 6.

I offer in evidence the printed or lithographed copy of the Government map of the Superior side of the Duluth and Superior Harbor, together with all of the data thereon, same being approved by the War Department on the 17th day of November, 1899, and ask to have it marked Plaintiff's Exhibit 7.

I offer in evidence blue print copy in two sheets, of the map of St. Louis Bay and River from the surveys made in 1884 and '5 under the direction of Major Charles J. Allen, known as the John B. Parkinson map, showing, among other things, soundings in these waters, and also showing the locus in quo, and ask to have the same marked Plaintiff's Exhibit 8.

I offer in evidence what is known as the chart of the Harbor of Duluth and Superior, prepared under the direction of Major W. L. Fitch, of Corps of Engineers of United States Army in 1902 and '5, but in connection with this map, and explanatory thereof I will offer oral evidence from the Engineer's Department, in that this map shows not the original, natural condition of all of the lands at the locus in quo, but shows the conditions subsequent to the improvement made as is set forth in the pleading, and it will be marked Plaintiff's Exhibit 9.

And now for the purpose of preserving the same with the evidence, I will offer in evidence the stipulation of the parties made for the introduction of these maps in this form, and it may be marked Exhibit 10.



The various documents were marked as requested and received in evidence without objection.

*(Testimony for Complainant.)*

ALFRED MERRITT, called as a witness on behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination.

By Mr. WASHBURN:

Q. Your name is Alfred Merritt?

A. Yes, sir.

Q. How long have you lived in the City of Duluth, or at the head of the Lake,—Superior?

45 A. Since about the 15th of October, 1856.

Q. How old are you, Mr. Merritt?

A. I am sixty-three years old,—I was sixty-three years old on the 16th of May, last May.

Q. What has been your occupation at different times since your residence here?

A. Well, sailing, boating, farming some here as a boy, lumbering, exploring, minerals?

Q. By exploring you mean exploring for minerals?

A. Yes, sir, and pine timber.

Q. And have you been engaged part of the time in the iron mining business?

A. Yes, sir, part of the time.

Q. When you say that your business during part of your life here has been sailing and boating,—on what waters?

A. On the waters of Lake Superior and the head of the Lakes.

Q. Do you know the location of a place called Fond du Lac?

A. Yes, sir.

Q. And for many years past been a frequent visitor to that place?

A. Yes, sir, since '57.

Q. And are you familiar with the waters of Lake Superior and waters at the head of the Lake up to Fond du Lac?

A. Yes, sir.

Q. And have been during all your life?

A. Yes sir. Have Pilot papers for Lake Superior and head of the lake.

Q. You hold Pilot papers for Lake Superior and the head of the Lake?

A. Yes, sir.

Q. You say you have explored in the forests lying to the North and West of Duluth?

A. Yes, sir.

Q. Are you familiar with the St. Louis River?

A. Yes, sir.

Q. And have you encountered it at many different places in the forest and elsewhere?

A. Yes, sir.



Q. Will you state whether or not water craft plying on Lake Superior during your acquaintance with these waters, [piled] as far as Fond du Lac?

A. You mean before dredging?

Q. Any time?

A. Before the dredging about nine feet was the depth of water and the steamer Manhattan went up?

Q. I am not so much now asking, Mr. Merritt, [asking] for any particular boat, I mean whether in the early days of navigation upon Lake Superior various craft plying on the Lake [piled] up as far as Fond du Lac?

A. Well, there was no other boat had any business beyond Superior, but the steamer Seneca, which was a passenger boat  
46 ran regular trips from Superior, and the Steamer Kit Carson in the early days.

Q. Well, how about—I mean to ask, generally whether craft plying on the Lake [piled] up as far as Fond du Lac?

A. Yes, when there was any business.

Q. What was there there in the early times, even perhaps before the personal experience of anyone living there now?

A. Trading Post.

Q. That is a well known historical fact, is it not?

A. Yes, sir.

Q. And the small vessels, that formerly navigated the Lake in the early times, it is the common legendary knowledge went up to Fond du Lac?

A. The first schooner I ever knew was the old Ford, that was in sixty-eight, that was a sailing vessel.

Q. You have mentioned some four or five vessels of your own knowledge that went up as far as that?

A. Yes, sir.

Q. And some that made regular trips?

A. Yes, sir. The Carson was a propeller and the Seneca was a side wheel boat.

Q. There have been Government improvements made in these waters covering over a period of many years?

A. Yes, sir.

Q. Tell me what has been the change, if any, with respect to the character and size of boats plying on these waters, these great lakes, during the past years, just generally?

A. Well, when my folks brought me up here, about nine feet was the draft of vessels at that time.

Q. And now, in the craft of commerce?

A. About twenty feet I suppose.

Q. And vessels of what length, ordinarily?

A. Well, I could not tell, Steamer Manhattan looked big to me at that time.

Q. Was that one of the largest boats?

A. Yes, sir.

Q. And drew about nine feet; you remember its going to Fond du Lac?

A. Yes, sir.



Q. How many years ago, you think?

A. Well, that was some time in Fifty-seven.

Q. Have you any idea of the length of such vessels as you speak of plying here in the early days drawing nine feet?

A. I couldn't say, they were not what we called canalers.

Q. Would they be seventy-five or one hundred feet?

A. More than that.

Q. About one hundred and fifty?

A. About that,—about 600 tons capacity.

47 Q. From such vessels as this in the early days the size of Lake vessels has grown so that they draw, some of them, twenty feet and are in length 600 feet?

A. Approximately, yes, sir.

Q. I suppose it goes without saying that the smaller craft, such as small sailing boats and row boats, and small steam boats and launches have always plied up and down these waters, have they not?

A. Yes, we had no launches, at that time.

Q. But in later years?

A. Oh, yes.

Q. It would be impossible, would it not, for these great Lake steamers, such as you speak of as plying the waters now, to enter this harbor here at any place without improvements having been made?

A. Yes, the entry is ten feet, generally the depth outside the Superior entry.

Q. During the course of many years has the Government prosecuted improvements in what is known as the Duluth and Superior Harbor?

A. Yes, sir.

Q. You know the location of a place called New Duluth?

A. Yes, sir.

Q. Where is that as to Fond du Lac?

A. It is about three miles this side of Fond du Lac.

Q. Whether some twenty years ago or more the beginnings of a manufacturing town were made there?

A. Yes, sir.

Q. And some of which still exists?

A. Yes, sir.

Q. Whether among other things there was a saw mill, plant, there?

A. Yes, sir.

Q. And whether boats carrying lumber on the Great Lakes plied up to that point and carried lumber?

A. Yes, sir.

Q. Whether for many years past multitudes of water craft, have been going up these waters, from Minnesota Point to Fond du Lac there, some of which sail the lake and some do not?

A. Yes, sir.

Q. Do you know the location of what is called Big Island, or The Island and I think some times has been called Clough Island, and which defendant Whiteside has considerably improved?



A. Yes, sir, I know it as Johnson's Island, and Hewitt's and Clough's and now it is Whiteside Island.

Q. I show you Plaintiff's Exhibit 8 and point out to you the portion of that Island shown here where it is designated on this map as "The Island," and I ask you if you recall at any time, or various times during your experience here, a little island  
48 which we have referred to in this case between Big Island or Whiteside Island and the Minnesota shore, designated on this map somewhat in the shape of a horseshoe?

A. Yes, sir, there is Milford Point there. (Witness refers to various points and objects along the map.)

Q. What was the character of that island as you first knew it and at different times as you have known it, with reference to whether it was a high, rocky or a low marshy island?

A. A little spit running along here with trees on it, and when the water was not too high you could come around on here, there were trees there, and marsh in here and hunt ducks over in here, kind of a little bay in here. (Pointing to middle of island.)

Q. Could you go over in there with canoes, and back?

A. Canoes.

Q. Then what you call the little spit, or little narrow point of land on the Northerly part of the Island, extending up to the North and the residue of the island is what you describe as marsh?

A. Yes, sir. Runs down along here. (Indicating on map.) It would seem to me that the bank of land was a little closer to the deep water channel.

Q. These [trees] that you say were growing there, what were they?

A. I think a few cedar and black ash.

Q. Are these trees such as are expected to grow in wet ground?

A. Yes, sir.

Q. State to the court whether during your experience and observation up here, this island has or has not been frequently covered with water?

A. Yes, covered with water when the tide rises up from the Northeast, have seen it covered over.

Q. Many times?

A. Yes, sir, I have seen it covered over, but not permanently.

Q. You know the location of what is called the first falls above the Indian village?

A. Yes, sir.

Q. The Indian Village is practically [synonymous] with Fond du Lac?

A. Yes, sir.

Q. I am asking you if the Indian Village is substantially the location of Fond du Lac.

A. Yes, sir.

Q. In coming down the St. Louis River, after you come over what is called here the first falls, I wish you would state generally the appearance of the waters as to form, thence down to what we may call for the purpose of designation, Lake Superior proper?



A. When you say the falls, do you mean falls or rapids?

49 Q. Oh, I mean rapids, up there after you come this way from Fond du Lac?

A. Why, it bays and lagoons or lakes.

Q. Inlets?

A. Inlets, and then what we used to call in the early days, easterly of Spirit Lake, as we called it upper St. Louis Bay, there was the St. Louis Bay and Upper St. Louis Bay.

Q. This, above Grassy Point was called Upper St. Louis Bay?

A. Yes, and over here was Pokegama Bay. Pokegama Bay would be southeast of Big Island; and to the Westward of Big Island was Spirit Lake. And St. Louis Bay was eastwardly from Grassy Point. And East of Rice's Point and Connor's Point it was called Superior Bay.

Q. In other words, from Fond du Lac down to the Junction of these waters with Lake Superior proper, at what you have referred to as the Superior entry, these waters spread out into various little bays, inlets, lagoons—many islands involved?

A. [No-] many.

Q. Some all the way down from Fond du Lac to the Entry?

A. Yes, sir, two islands. In Superior Bay I suppose two or three.

Q. Are these waters, including at the place in question here (indicating on map) Big Island, are these waters or are they not substantially on the level with the waters of Lake Superior proper?

A. Yes.

Q. And have they always been——

A. Subject to the rise and fall—tide running up and down.

Q. But the current has run both ways?

A. Yes sir.

Q. And that is not a matter of seldom occurrence, is it?

A. Oh, no.

Q. But of general [occurrence]?

A. I remember when we sailed in sixty-five, the old schooner and we had to row,—we would watch for the current and get up to Milford——

Q. That is a little East of the Island in question?

A. —would go on watch—with the current.

Q. And so you have been sailing these waters, in early days you have gone up with the current as well as down?

A. Yes, sir, the tug boat and yawl boat.

Q. Is it, or is it not a fact that the waters of the [L-ke] set back as far as Fond du Lac?

A. Oh, yes, as far as the village.

Q. Well, that is what I mean?

A. Yes, sir.

50 Q. The St. Louis River, above Fond du Lac, is or is it not a stream flowing through banks?

A. Yes sir, it is.

Q. Rapid flow?

A. Yes sir, not navigable, I think about a mile and a half they took the canoes up to the bridge.



Q. That was up rapids?

A. Yes sir, pull it up with ropes.

Q. I ask you Mr. Merritt, whether these waters here between, say, inclusive at least of Spirit Lake, thence down to the Superior entry, whether in appearance they have any resemblance to a river?

A. I should say not, on the surface, no.

Q. Whether do they not resemble rather an arm, or arms and inlets from the sea, the Lake?

A. Well, I should think they were bays.

Q. The Superior Entry, how far across the points, between these points—between the waters of what you call Superior Bay and the Lake proper, what is the distance there in its natural condition?

A. Oh, I don't know, it is only a short distance.

Q. Well, a few rods?

A. Yes, that's a few rods.

Q. What is the character of the land on either side of that entry?

A. Sand.

Q. What generally, is the character of the soil on Minnesota Point and Wisconsin Point?

A. Minnesota Point is gravel first, and sand next.

[A.] And Wisconsin Point?

A. I think Wisconsin Point is practically sand, I am sure it is, what I can remember.

Q. Do you know the widths of these points, generally speaking?

A. No, I don't know the widths exactly, I know they are narrow.

Q. And in Minnesota Point, is any place so narrow that the water washed over it?

A. Yes, blowed through.

Q. I will ask you whether you have seen what we may call the blue water—how far up you have seen on the surface what you may call blue water of the Lake?

A. Well, I remember of seeing it one time up two thirds of the way to Oneota in St. Louis Bay.

Q. And the waters set back by the rise of the Lake as far as Fond du Lac?

A. Yes sir, it does, but it was still then—

Q. I will ask you this, if, when the wind blows, Mr. Merritt, from the Lake and the waters are brought in and set back, the blue water that you speak of would not show, would it?

A. Oh no.

51 Q. You speak of seeing blue water up here because it was still.

A. Water came in through the Superior Entry.

Q. That was when the waters were still?

A. Yes sir.

Q. Do you know about what extent there is to the rise of waters here when the waters come in from the Lake?

A. Oh, I don't know, I have seen it rise in Oneota four feet.

Q. You speak of Oneota more particularly because that is your former residence?

A. Yes sir.



Q. Do you know the distance across Spirit Lake, the widest place there, across over, between the Minnesota and Wisconsin shores, there beyond Big Island?

A. This side of Big Island?

Q. No, the other side?

A. Well, the other side of the Island, the West side of the Island is narrow, must be 600 or 700 feet across.

Q. (Indicating on map.) Here is the Island and here is Spirit Lake—what I am asking is about the distance across?

A. Oh, I can guess—this is about the—

Q. Well, that is something like [200 miles], is it not?

A. Yes, sir, I know it is a mile and a half across St. Louis Bay.

Q. That is from East to West?

A. No, the Wisconsin side on St. Louis Bay is about a mile and a half from Oneota, before the bank carried off.

Q. And grows wider as you get near to Rice's Point?

A. Yes.

Q. Generally speaking, let me ask you Mr. Merritt, if from Fond du Lac down to Lake Superior proper, and by that I mean East, of Minnesota and Wisconsin Points, if there is not in a general outline, although accompanied by many indentations of the shore, a widening from the point at Fond du Lac down?

A. Yes sir.

Q. And that widening continues on as to the opposite shores of Lake Superior, does it not?

A. Yes sir.

Q. As you go further East the Lake becomes wider?

A. Yes sir.

Q. Until the maximum width is reached?

A. Yes sir.

#### Cross-examination.

By Mr. HARRIS, counsel for defendant Whiteside:

Q. Mr. Merritt, with reference to the water craft that plied the waters at the head of the Lake and from between Minnesota Point and Fond du Lac, I will ask you if in the early days there was any regular traffic, water traffic from Duluth or Superior to Fond du Lac?

52 A. There was, yes sir.

Q. What did it consist of?

A. There was two lines of boats, the Kit Carson was a side wheel boat which came from Ontonagon, and she came here, I don't know exactly when she came, some time in fifty-six or early in fifty-seven, and then she ran here a year or two and then there was a steamer Seneca brought up from Buffalo to run a rival line, so there was two lines running from Superior to Fond du Lac, touching at Oneota and different places along where fellows went out with boats to get their mail. And two boats ran a daily line.

Q. Ran a daily line.

A. Yes sir, rival.



Q. How long did that continue?

[Q.] Well, that continued up until about fifty-eight, I know it was a year after the hard times came, and then the Carson sunk over in Superior, and the Seneca continued to run for about a year.

Q. What did the traffic consist of?

A. Passenger and freight.

Q. Mostly passengers?

A. Excursions, yes sir.

Q. From Superior to Fond du Lac?

A. Yes sir.

Q. Was there any freight traffic in these days to amount to anything?

A. Well, not what you would call freight traffic, supplies for the settlers along the line and stores at Fond du Lac, practically all excursions.

Q. And what season of the year did these lines you speak of run?

A. Well, one year they ran all year.

Q. Would there be excursion traffic back in these days?

A. Well, they ran in—I don't think they paid.

Q. And this continued for about two years, you say?

A. About two years, yes sir.

Q. That would be from '56 to '58 then?

A. About that, yes.

Q. Now, about 1858 was there any regular traffic by water, any regular lines?

A. No, I don't think so, they ran until fifty-nine, I would not be positive after this—afterwards any regular lines.

Q. Now, when these lines were running was that simply local traffic between Duluth and Superior and Fond du Lac?

A. Yes sir.

Q. There never has been any regular lines of boats plying Lake Superior, and running on up the St. Louis River to Fond du Lac.

53 A. No sir, only two other than tugs, that was in sixty-eight. I was running the tug [Agate then] but only two, the Sam Ward and the Propeller Manhattan, and the schooner Fond du Lac, taking payment goods to the Indians, but not regular.

Q. You have spoken of several inlets and bays, St. Louis Bay and Pokegama Bay and Upper St. Louis Bay; I will ask you Mr. Merritt, what waters form or feed these lakes or bays, or inlets?

A. The St. Louis River comes in above.

Q. All of these waters are formed by the over flow of the St. Louis?

A. Yes sir.

Q. There are no streams that amount to anything feeding these waters, except St. Louis River?

A. There are creeks, but not large creeks you know? Mission Creek, and Pokegama River they are small.

Q. Where Pokegama Bay and Spirit Lake and Upper St. Louis



Bay are located, they are low marshy lands are they not, outside of the regular bank of the St. Louis River?

A. Well, there are rush beds in different places and as I call to mind now, this side of the island, on the East of it, Northeast is a little marshy island in there, I guess partly cut away now, and then this other Island Mr. Washburn called my attention to, and the other things were practically reeds and rushes.

Q. Well, in fact, these bays, Pokegama, Upper St. Louis and St. Louis Bay are all formed by the overflow of St. Louis River?

A. Well, I don't know how they are formed, I know the St. Louis empties in the upper part—

Q. I merely mention the surface water—

MR. WASHBURN: What do you say, they are—

MR. HARRIS: I mean they are formed by the overflow of the St. Louis River.

A. Well, the Lake backs up.

MR. HARRIS:

Q. Only at times? All of this country up there, these waters are higher than Lake Superior, are they not?

A. Up to Fond du Lac?

Q. Yes?

A. As a general thing, I was on the railroad survey one time where they found the water was two feet lower than down here.

Q. But generally speaking, there was a fall of the waters, all the way down from Fond du Lac until they empty, near Minnesota and Wisconsin Points, into Lake Superior?

A. Yes, sir.

54 Q. In fact the general trend of the flow of Lake Superior is East?

A. On the North shore the waters flow up the shore, you go down the South shore you will find currents to the East and you will always find currents pointing up to the end of the Lake, it is so in all large lakes.

Q. There is a fall at the end of Lake Superior, at Sault St. Marie?

A. Yes sir, but the current up the North shore is what makes the water go in there.

Q. Now you say that the waters of the Lake some times set back as far as Fond du Lac?

A. Yes sir, back the water up.

Q. What causes that?

A. The rise of the water in this end of Lake Superior.

Q. There is no other cause?

A. Yes, there is a tide.

Q. A tide in Lake Superior?

A. A regular tide.

Q. When does the tide rise and fall, is it like the ocean?

A. I refer you to the Government statistics they keep.

Q. When does the tide rise and fall, is it like the ocean tide?

A. Well, I don't know whether it is like that.

Q. Do you yourself know or have any information, what causes this tide to rise and fall in Lake Superior?



A. No, I don't know, but I know from experience, and if we get aground—I don't know if it is proper to talk this way, but we would have to wait for the rise of the tide, and if we got aground at low tide we would have to wait to unload lumber, and it would be three or four hours for tide to rise six inches.

Q. Is it not true, Mr. Merritt, that the setting back of waters inside of Minnesota Point, from Lake Superior, are [cause-] mostly by the Northeast winds?

A. Well, I should say the great rise, but there is a tide on Lake Superior.

Q. Now, does that tide operate at [states] times and at stated intervals, Mr. Merritt?

A. I could not say that.

Q. You don't know?

A. No, I do not.

Q. You don't know whether the tide, this tide you speak of occurs every twenty-four hours, or occurs once every week, or occurs once in a month?

A. Oh, it occurs several times a day.

Q. Several times?

A. Yes sir.

Q. Do you know whether or not it occurs at regular intervals during the day?

A. No, I do not.

55 Q. But you are certain it occurs several times every day?

A. Yes, I am sure.

Q. And to what extent does this rise and fall occur several times a day?

A. About nine inches, it is quite often for it to rise nine inches and lower nine inches.

Q. Then do I understand you to say that several times every day in the year, the waters of Lake Superior will rise and fall from eight to nine inches?

A. Yes sir.

Q. And that will cause a corresponding rise and fall in the [waters] inside of Minnesota Point?

A. Yes sir, it will, reaching up the Bay quite often.

Q. And that is daily?

A. And that is daily, yes sir, right here in the canal.

Q. You say you have seen the water rise at Oneota a distance of four feet?

A. Yes, sir, I have.

Q. Within what length of time?

A. It is a number of years ago.

Q. Do you remember when that was?

A. Well, I think that was in '58 or '9, I remember when the dock went out, the piers went out.

Q. Have you ever seen any other such rise as that?

A. Well, it rose higher than that one big storm.

Q. Was that rise you speak of due to a Northeaster, Northeast storm?



A. Yes sir.

Q. And was that after the artificial channel was cut through?

A. That was before.

Q. That was before?

A. Yes sir.

Q. What is, or about what is the average width of Minnesota Point?

A. Oh, I could not—I never paced it over, I could only give a guess, it is about seven miles long, a narrow spit of land.

Q. Minnesota Point originally was a point that was attached near the end of Lake Superior to the Minnesota side.

A. Yes sir.

Q. And extended in a Southeast direction to within a few hundred feet of the Wisconsin shore line?

A. Yes sir.

Q. And this point separates the waters of Lake Superior from what is known as Duluth and Superior Bays?

A. Yes sir, that is the entrance.

Q. That point has been there ever since you lived in Duluth?

A. Yes sir, it has extended out some since I was there, it has lengthened out.

Q. It has lengthened?

A. Yes sir.

Q. You could always go on dry land from the Minnesota shore to what is now known as the Wisconsin entry?

56 A. Oh, yes, but I mean it extended out from the old light house, toward Wisconsin.

Q. And according to tradition, that point has been there beyond the memory of man?

A. Oh, yes.

Q. It is covered, or was originally, by a growth of large trees extending almost the entire length of the point?

A. Yes. That other question, you said tradition?

Q. I mean common report?

A. Well, when I was a boy there was a tradition that the entry was over here. (Indicating on map.)

Q. Down in what you call the narrows?

A. Yes sir.

Q. How far back did tradition go?

A. Less than one hundred years, just tradition—there was an Indian—

Q. What about the Indian?

A. The Indian said the channel ran out, when he was a boy through that place.

Q. Mr. Merritt, you have been a timber cruiser?

A. Yes sir.

Q. Know more or less about the growth of pine timber?

A. Yes somewhat.

Q. You have been down on Minnesota Point frequently?

A. Yes sir.



Q. You know there are still standing on Minnesota Point trees from 75 to 80 feet in height?

A. Yes sir.

Q. In your opinion, what is the age—as a timber man, what could be the age of those trees?

A. I could not tell.

Q. Were they there as far back as you remember?

A. Yes sir.

Q. And large trees at that time?

A. Larger than they are now.

Q. Minnesota Point has been inhabited for the last 50 or 60 years?

A. Well, the other end—Stuntz' Dock was built there in fifty-two or three, and then there were three or four houses, one house standing there that was built in fifty-three. And right here, where the canal was, is where the other settlement was.

Q. Well, to a certain extent inhabited for 60 years?

A. Yes sir.

Q. No tide or overflow, so far as you know ever destroyed residences or buildings on that point?

A. Just a few storms that washed over it, such as you had down here in seventy-two—the time the Sweetheart—the storm——

Q. Were you here, Mr. Merritt, at the great storm in November 1905?

A. No sir.

57 Q. Do you know of any storm except in 1872 that ever swept clear over?

A. No, I don't know as I do, No.

Q. And did that storm sweep over the point in such a way as to destroy vegetation and carry away buildings?

A. No sir.

Q. That was only at special places?

A. That's all.

Q. So far as you know, there is no point where the lake broke through and formed a water connection?

A. No sir.

Q. Where was the natural entry from the St. Louis River and these bays spoken of, into Lake Superior?

A. When my folks brought me here in '56 it was right beyond the light house.

Q. Near where the Superior Entry is?

A. Yes sir.

Q. How wide was that natural entry before the Government made any improvements; how wide was the channel which connected St. Louis River and these bays with Lake Superior?

A. I should say 500 or 600 feet wide.

Q. And that was the only connecting link between these waters from Fond du Lac to Lake Superior?

A. Yes sir.

Q. What is now known as the Duluth Canal was cut through in 1871.



A. Yes sir.

Q. What did you put the depth at where the water emptied from St. Louis River into Lake Superior, about eight or ten feet.

A. I did not want to say that the river where it went out is just eight or ten feet wide, but where we come, in, we had to come up this way, (indicating on map), this side of the light house and then run Southeast along Minnesota Point, and there is where the bar was along here, (indicating on map), straight out there would be a bar there and the ten feet of water was outside and a bit that way and then over, over half a mile to get in that way.

Q. Now, Mr. Merritt, I will ask you if there is now and always has been so long as you remember, a well defined current and channel in the waters from Fond du Lac, the Indian Village, Fond du Lac, down to the point where these waters empty into Lake Superior?

A. Yes, we had the channel,—where we had to go up often in Superior Bay, we had to keep on a straight line up into St. Louis Bay and then float out in St. Louis Bay, and after you get to Oneota went straight South and struck St. Louis River, always more water down than up.

Q. There is a well defined current and channel from Fond du Lac to Lake Superior?

A. Yes sir.

Q. I suppose after you get out in Lake Superior there is no current?

58 A. Except on the shore, there is quite a strong current.

Q. Different from a river current?

A. I don't know, I have seen it there in towing logs, I have seen it when I have had to stop towing from the South Shore up current.

Q. Would that be a natural current any time?

A. Natural current on good day.

Q. When the [w-ter] is still?

A. Yes sir.

Q. Is there not a general trend of water in the Lake?

A. No, on the North shore it runs practically all the time. But the trend of the current on the North shore in Lake Superior is always the same.

Q. Now where did this, after you entered the Superior entry, Mr. Merritt, that is the point where these waters emptied into Lake Superior, where did the current inside of Minnesota Point, where did it run, say with reference to Superior Bay, you know what we call Superior Bay now I believe is known as the waters between say, Connor's Point and Minnesota Point, where did that current, the channel, the natural current or channel run, very close to the Wisconsin shore?

A. No, it went straight down as near as I can tell, as you come through the entries between Connor's and Rice's Points, almost to the point, water hugged Minnesota Point after you get down to a reasonable distance outside,—and hugged Minnesota Point. A big boat could go there and not get aground.

Q. Then from that point what direction did the current take to reach the point between Rice's and Connor's Points?

A. You mean from where?



Q. From the point where you speak of, you said the channel hugged Minnesota Point up to a certain point.

A. I said it went straight from Minnesota and Connor's down to a certain place.

Q. Now, Mr. Merritt, after you get beyond Grassy Point, you know where Grassy Point is?

A. Yes sir.

Q. After you get beyond Grassy Point and going up the River, going up stream, tell the court about where the natural current or channel ran, the old natural channel.

A. Well, I could not tell you any different than where the current is marked.

Q. That hugged the Minnesota shore pretty close?

A. Well, it went around what we called, vulgarly speaking, the devils elbow, where the Club House is on the Wisconsin side and then went straight up past Milford.

Mr. WASHBURN:

Q. Won't you describe, Mr. Merritt, where Milford was located?

A. Up on the West edge of West Duluth, where the boat house is (indicating on map), here is Milford.

59 Mr. HARRIS:

Q. Now, when you got to what is called Big Island, where did the old natural channel run with reference to the Big Island and the Minnesota shore, it hugged pretty close to the Minnesota shore?

A. Yes sir.

Q. Where was the old natural channel with reference to the small island which you testified to on your direct examination, was the old natural channel between the Minnesota shore and that small island?

A. Yes sir.

Q. That is the deep water channel was Northerly of that island?

A. Yes sir, but you could get over through here you know, South of Big Island. I used to get over here with small tugs. Seneca used to go through there sometimes.

Redirect examination.

By Mr. WASHBURN:

Q. Referring now, back to some testimony when you spoke of there not being regular lines of steamers, you mean that there were no steamers plying at regular dates. After these that you mention?

A. Yes sir, that is what I mean.

Q. You do not mean that boats for one purpose and another, plying on the Lakes did not frequently go up as far as Fond du Lac. You don't mean by saying that there were not regular lines, to say that boats did not frequently go up, did you?

A. Well, there was not any boats to go up, except the Seneca after the Carson was gone, she used to run up twice a week.

Q. Well now, about twenty years ago or so there was lumber?

A. Oh yes, I am talking about '57 up to '60.

Q. Yes, I mean now, after that up to the present time?



A. Oh yes.

Q. And boats did not go up often, though they were not on schedule or regular time?

A. Oh, yes, carried lumber.

Q. And for the last year or so have there not been regular boats plying up and down between Duluth and Superior and Fond du Lac,—passenger boats?

A. I think so, yes.

Q. Have there not been, for a large number of years a line of steamers through the season of navigation plying to Fond du Lac and back daily, making one or two trips a day?

A. Yes sir.

Q. Double deck steamers?

A. Yes sir.

60 Q. Now, in answer to counsel's question, whether these waters were all waters of the St. Louis River,—you stated that St. Louis River flowed in at the upper end, I will ask you if there are not numerous little streams flowing in?

A. Yes sir.

Q. I will ask you if there are not small streams flowing into these little bays?

A. Yes sir.

Q. Are not many of these little bays marked by high banks, as the bays extend back into the land?

A. The Pokegama Bay in particular, and behind Pokegama Bay there are high banks.

Q. Counsel referred in one of his questions, to regular banks of St. Louis River,—I will ask you if there are any banks on St. Louis River or any other River, after you get to Spirit Lake, or are there any banks showing streams flowing between?

A. Well, I don't understand you.

Q. I don't want to take time to refer back, but he asked you about the current of the St. Louis River, I will ask you if this current of which you have spoken in cross-examination as extending into these waters out into the lake, if there is not water on each side of that current, generally speaking?

A. Why, the current when it comes down,—the current when it goes up it is all over the whole flat and when you row up you have current just the same.

Q. And are there no currents between these islands?

A. Why sure.

Q. And my question is whether there is in fact any bank like the banks of the river above Fond du Lac, is there any regular banks below that point?

A. Why, no, except where the deeper current is.

Q. But it is under water, is it not?

A. Well, you will find it when you get deeper.

Q. In other words there is a deeper current in places, which you in a measure described?

A. Yes sir.

Q. Is there not a tract of land on Minnesota Point which you refer to as the Barrans, on which there is no vegetation to speak of?



A. Not to amount to anything.

Q. You speak of the end of the Superior Entry as being the only connection between Lake Superior and these waters on the inside of the Point, I suppose you mean the only surface connections?

A. Why, of course the water flows through the sand.

Q. That is what I am getting at, whether there is [percolation] there?

A. Yes sir.

Q. Do you know how far down you have to go to get to the water?

61 A. Why, I don't exactly, you only have to go to the level of the water.

Q. Now, you say there is a current in there through these bays and far out into the lake?

A. Yes sir.

Q. And on the North side of the lake the current backs up to the westward, and on the south side it is in the other direction?

A. Yes sir.

Q. Now, the current just the same as it is in the waters West of Minnesota Point, extends out into the Lake some distance on the South side?

A. Well, I had to keep down within the outside of the three mile limit of the shore and missed the current on the south shore, and on the North shore came up with a raft, stuck close to the shore coming this way.

Q. I will ask you whether there was not a channel, calling it a channel, or deep water channel, on the South side of Big Island, reaching from Spirit Lake on the South side of Big Island?

A. Yes, flowing two ways there, branch of the current came this way, (indicating on map), it comes close here.

Q. And originally deepest way in there?

A. Yes, deepest way down here to the entry of Pokegama Bay, I think it is, yes.

Q. Mr. Merritt, is it not a fact that on the North shore of these waters between Fond du Lac and twelfth Avenue East in this city, there were and are still over twenty-five streams flowing into the Lake and into these waters?

A. I suppose there may be.

Q. As a matter of fact, were not there seventeen streams flowing into these waters between twelfth Avenue East and nineteenth Avenue West, right in the townsite of the City of Duluth?

A. Why, I know practically every stream. Quite a little of them used to be trout in,—all of them practically.

Q. Now then, you used to call,—now I don't claim that what you call these waters any time,—designates their true character,—you used to call these waters between Grassy Point and Minnesota Point St. Louis Bay?

A. Yes sir.

Q. And between Rice's Point and Minnesota Point you called Superior Bay?

A. Yes sir.



Q. And between Spirit Lake and Grassy Point Upper St. Louis Bay?

A. Upper St. Louis Bay.

Q. And these waters in common [speech] were called St. Louis River?

A. Well, speaking in general terms, going up to Fond du Lac, might say going up the River.

Q. Commonly speaking?

A. Yes sir.

62 Q. What does Fond du Lac mean, do you know?

A. Where the bottom reaches the top.

Q. Head of the Lakes?

A. Yes sir.

Q. You are familiar with that old Bayfield map, I suppose?

A. Yes sir.

Q. He called the channel South of Big Island?

Mr. RICHARDS: I must object there.

Mr. WASHBURN: Withdraw it, he objects, call it anything, question is, what is it.

Mr. WASHBURN:

Q. Do you know whether or not there are springs in these waters, Lake Superior and these head waters?

A. No, not around this part of the country.

Q. You don't know?

A. No sir.

Recross-examination.

By Mr. HARRIS:

Q. In regard to the present traffic between Duluth and Superior and Fond du Lac, do you know of any regular traffic except excursion boats?

A. No, I do not, not now.

Q. Have you ever known at any time of any regular lines of traffic from lower Lake Ports to Fond du Lac?

A. Yes, the steamers that went up there for lumber at the saw mill at New Duluth, big saw mill there.

Q. Well, are there any lines,—you know there are numerous lines of boats that ran for years between Buffalo and Detroit, and Superior; do you know any lines of boats that made regular traffic trips between the lower Lake Ports and either New Duluth or Fond du Lac, or if they only go up very occasionally?

A. Went up there for loads.

Q. Is that practically all of the traffic, Mr. Merritt, that ever occurred on these waters up to Fond du Lac, local traffic between Duluth and Superior and Fond du Lac?

A. Why yes, from Superior up.

Q. Ordinarily speaking of the color of the water, the color of the water inside of Minnesota Point, speaking generally, is entirely different from the color of the water outside in Lake Superior?

A. Yes sir.



Q. Now, these streams that counsel has spoken of running into these waters above Minnesota Point from the North Minnesota shore, they are small streams?

A. Yes, sir, trout streams.

Q. And except in times of heavy rains there is no amount of water coming down?

63 A. Small streams.

Q. And except heavy rains very little comes down?

A. Since the timber is cut there is not very much water coming down there continuously.

Q. In regard to that channel on the South side of Big Island, was that ever used in the early days?

A. Used practically altogether with the excursion boats. I took the Ford in in '68, but when the old Manhattan went out, and Seneca and Ward, they went out in the main channel.

Q. In the early days they called the main channel the St. Louis,—that ran close to the Minnesota shore in the river?

A. Yes sir.

Q. Is there any specific point up there where the St. Louis River commenced,—could you point out the place where the St. Louis River ends?

A. I should say it ends at Fond du Lac.

Q. Ends at Fond du Lac?

A. Yes.

Q. And it is not St. Louis River after you get by Fond du Lac?

A. No, after you come this way.

Q. Speaking in common parlance, don't people in Duluth and Superior, when they are going up to Fond du Lac and New Duluth,—is not the general term, going up river?

A. Well, I don't think it is used now so much.

Q. Don't you ever hear people say going up river this afternoon?

A. In the old days we said we are going up river to Fond du Lac, although we passed through these bays.

Q. Speaking of it generally in description, from Lake Superior?

A. Fond du Lac was going up river.

Mr. WASHBURN:

Q. Was there not a sandstone quarry up there, and didn't they handle sandstone on boats and scows?

A. Yes, we dug sand on Minnesota Point in '68 when I was running the Agate, we went up, took scows up the River, you understand?

Q. You took them up by hand?

A. We took them up by hand.

Q. One other question. I will ask you if the color of these waters in these bays might be materially affected by the sediment carried into them by these rapid little streams that flow in there, all around?

A. The color comes from the swamps, tamarack swamps.

Q. Is the color more or less affected by the refuse from manufacturing plants floating in these bays?

A. I could not tell.



64 Mr. HARRIS:

Q. Is the color mainly due, Mr. Merritt, to the fact that these waters inside of Minnesota Point are so much more shallow that the color is due to stirring up from the bottom?

A. I don't think so, it is from the tamarack swamps; you see it coming down and it is the same color, in the summer time, in the winter time it is clear.

At this time Court adjourns to 2 o'clock P. M. Monday July 11th, 1910, at which time proceedings were resumed as follows:

ALBERT SWENSON, called as a witness on behalf of the plaintiff, being first duly sworn testifies as follows:

Direct examination.

By Mr. WASHBURN:

Q. Your name is Albert Swenson?

A. Yes sir.

Q. Where do you live, Mr. Swenson?

A. I live out at what we call Spirit Lake, old Spirit Lake.

Q. How long have you lived there?

A. Since the fall of 1870.

Q. And by Spirit Lake you mean Spirit Lake lies, we will say between West Duluth and Fond du Lac in this county?

A. Yes sir.

Q. What has been your business Mr. Swenson?

[Q.] Well, all kinds of business; logging, lumbering, picking up logs, farming and any way to make an honest living.

Q. Your home is on the shore of Spirit Lake?

A. It is, yes sir.

Q. You are familiar with Lake Superior and the waters at the head of Lake Superior all the way from Fond du Lac down?

A. Well, not so much the mouth, that is, the outlet,—the entries, as Oneota and up above.

Q. Did you hear Mr. Alfred Merritt's testimony this morning with reference to a little island lying between what is known as Big Island, Clough's Island and the Minnesota shore?

A. I did.

Q. And you heard his testimony with reference to the growth of timber?

A. Yes sir.

Q. What have you to say with reference to his description of that island,—is it substantially correct?

A. Well, he was probably nearly correct in that, but when I—of course you have not asked the question.

Q. No, I am not going into that at all?

A. It is alders and willows.

Q. You think the growth is mostly alders and willows?

65 A. Well, a certain portion, if you show me the map here I can tell you where they were.



Witness points in his testimony to the North edge of the island and states that the same was covered with alders and willows, mostly alders and willows. That the point farthest Northeast was lower, and had nothing on it, that the residue of the island was marshy.

Q. Now, Mr. Swanson, you have heard Alfred Merritt's testimony with reference to the waters setting back, what have you got to say about that?

A. Well sir, I have got this to say, that I believe Alf come pretty near as far as he knew was a fact, but probably he had not—

Q. The only thing that I am getting at is now whether or not in your experience and observation the waters do set back and do flow both ways?

A. They do.

Q. And whether or not you have noticed as he indicated in his testimony, somewhat of a periodical movement of the waters at different times?

A. Yes, that is a fact, there is no question about that?

Q. Now, that is independent of the movement of waters by great storms?

A. Yes sir.

Q. You have any experience of your own in respect to the current moving upward?

A. Yes.

Q. You told me something once about your experience with a raft?

A. I have known that there is no use to try to tow up current even if the wind is in your favor, with a raft of logs, or cedar poles or anything of that kind.

Q. You had some experience of that kind?

A. I had.

Q. What was it?

A. Well, in olden days I had a good deal to do with logs, cedar poles, and had quite a lot taken out of Spirit Lake, that is the mouth of Spirit Lake, there is no canal to go through, the only entrance was down below. Of course you didn't ask me that question, but in order to get around this to make you understand what I mean I have got to show how this happened. Now of course the current runs right through, but then when I got there with a raft and the tide was against us we might as well try to buck the moon as the current.

Q. Were you ever carried up stream by the current?

A. Yes, in the Lake.

Q. With your raft?

A. Yes sir, pretty near down to the mouth, yes sir.

66 Cross-examination.

By Mr. HARRIS:

Q. General current,—the trend of the waters inside of Minnesota Point is outward, toward Lake Superior?

A. Yes sir, the current is generally down.



Q. You mean to say that there are times when the entire body of water in these waters inside of Minnesota Point, are up stream?

A. I do, yes sir.

Q. And does that ever occur [extept] when there are storms strong Northeasters?

A. Yes sir.

Q. And how far up does that extend?

A. Well, as far as my observation, that is as far as any ordinary man's observation, would be the Bays inside of the old St. Paul and Duluth railroad,—the current is either one way or the other, in or out and between the changes, it isn't over a minute or two and the change is made, and the current is as swift one way *and* the other and that occurs about every two hours.

Q. Regularly?

A. Well, I would not say to a minute, but as every man, old timers went fishing, great fishing place, and they could not help but observe it, I don't know as anyone ever timed it, but I do know this—that the change is somewhat within two hours, about two hours up and two hours down.

Q. How far up the St. Louis River does this current extend when this change takes place?

A. All the way up I should judge to about three fourths of a mile below the present depot, very nearly a mile below the present depot at Fond du Lac, I don't doubt but possibly it is up stream above that, but that is the first place you notice.

Q. And the current is always down in this direction above Fond du Lac?

A. What comes from the River [natuæreally] has to come down.

Q. When this current is backing up you say from Minnesota Point to and as far as Fond du Lac, that must wall up the waters?

A. I don't know as it walls it very high, it will raise it some inches, it will raise it so that it is readily noticed all right.

Q. And how frequently do you say that occurs?

A. Well, I am pretty sure about every two hours.

Q. During each day in the year?

A. There is an up and down tide, in and out, when I observed it up there at Spirit Lake and on the Northern Pacific Railroad, where the railroad is built across.

Q. Then you would say that during each day in the year all the waters in Duluth and Superior Bays and St. Louis Bay and  
67 Upper St. Louis Bay and Spirit Lake, the current is running up stream,—what we call up stream?

A. No, not the natural current, I don't mean that, but the tide water from the Lake.

Q. Well, but, does that change the currents of all of these points, all waters inside of Minnesota Point, so that if you were to place a flat piece or log in these waters it would go up stream instead of toward the Lake?

A. Yes, I have seen that frequently.

Q. But does it occur at frequent intervals?

A. I know that to be a fact without a wind, and even with a



timber, where there was a timber to float up, it would float and the wind against it,—and was going up,—the tide was up, the timber would float with it.

Q. Do you mean to say that the conditions were ever such that if you were to place a log in the water at the Northern Pacific Bridge, near Grassy Point, that that log would ever float up to arrive at Spirit Lake?

A. I don't know as it would get that far up, but I do know one instance when this raft of cedar and horse on top got across on Big Pokegama and came way over, around one of those bays, there are a lot of these bays now on the Superior side; but I had somewhere in the neighborhood of 1,000 posts. I swam the horse over, taking him over there to haul, and when I got there I put the horse on top and went back, and I got as far as short cut and got across, and the tide seemed to be up, and as soon as I crossed the short cut on the Northerly end of Big Island, took the logs and loaded them on cars there.

Q. That is outside of the main channel?

A. That was the old original channel. This was in 1880.

Q. And what I want to ask you is, whether or not the waters running down the old channel, the old original, main channel, in the St. Louis River and through this Upper St. Louis Bay, whether you contend that the waters in that main channel ever,—the main body of water in that main channel turns and runs back up hill or up stream?

A. Well, that would be a hard thing to determine. My idea would be when the tide from the Lake meets this River Water, that is it rises from the Lake and backs, the river water would naturally have to rise up, and whether it would be river water or Lake water would be hard to determine, but we do know that there is an inflow and outflow from these natural inlets.

Q. How wide is the river above Fond du Lac?

A. You mean up the rapids?

Q. Well, just above Fond du Lac, how wide is the river there?

68 A. That is something I have never measured. Two hundred or three hundred feet.

Q. The banks are well defined up there.

A. Oh, yes, and above.

Q. Now, if all of these points of water inside of Minnesota Point, if they at certain times during the day should reverse their current [nd] the waters flow back towards Fond du Lac, and as all the waters above Fond du Lac are always coming down in this direction, if that was to happen it would [creat-] high waters above Fond du Lac?

A. I don't understand your question. Now I lived alongside of the river all my life. Now what you mean,—do you ask this question, as the river rises with a storm or does it rise with a tide or with a flow from up the river, or a heavy storm.

Q. I understand you to state that the current of the river is



always in the direction of the Lake above Fond du Lac, and that the river above,—

A. When the tide is up then it is an up flow.

Q. Is it an up flow above Fond du Lac?

A. Not above Fond du Lac.

Q. And the river is comparatively narrow above Fond du Lac?

A. Narrow there, yes.

Q. And if there are times when all of these waters set back and flow to Fond du Lac, it would necessarily [creat-] a very sudden and rapid rise of the waters above Fond du Lac.

A. Oh, I guess not.

Q. Well, if it is running down hill from one direction and a counter current it would have to rise would it not?

A. No answer.

JOHN H. DARLING, Called as a witness on behalf of the Plaintiff, being first duly sworn testifies as follows:

Direct examination.

By Mr. WASHBURN:

Q. What is your full name, Mr. Darling?

A. John H. Darling.

Q. Where do you reside, Mr. Darling?

A. Duluth.

Q. How long have you lived in Duluth?

A. Twenty-six years.

Q. What has been [you-] business, or profession?

A. Harbor improvements, Civil Engineering work.

Q. You are by profession an engineer of that class?

A. Yes sir.

Q. And in the employ of the United States Government, and are now so employed?

A. Yes sir.

69 Q. You might very briefly state, to some extent, the line of your work, that which comes under your supervision and the position you occupy?

A. Principal Assistant Engineer.

Q. And your chief would be?

A. My chief is the Government officer in charge, Colonel Fitch.

Q. At the present time?

A. Colonel Fitch.

Q. And previously?

A. Previously has been several officers in succession.

Q. Captain Potter?

A. Captain Potter, Major Gaillard, Major Sears, Major Quinn.

Q. They are the Government officers [members] of the corps of engineers of the United States Army?

A. Yes sir.

Q. They have each one in turn had general charge of the Harbor and improvements, and you during all of these years have been principal Assistant Engineer under these various chiefs?



A. Yes, that is, I have been principal assistant engineer, except along at first.

Q. You were occupying your present position at the time of the preparation of the maps, Plaintiff's Exhibit 6 and Plaintiff's Exhibit 7?

A. Yes sir.

Q. Corresponding maps?

A. Yes sir.

Q. And were you such assistant Engineer, or have you been such Assistant Engineer during the work that has been in progress in these waters in the way of improvements since this map was prepared and the surveys made which resulted in their preparation?

A. Yes sir.

Q. The various lines I think that are shown on these maps are sufficiently designated without taking your time,—I think they are. I will briefly ask you if the red line on Exhibit 6 shows dock line on Minnesota side?

A. It does.

Q. And the red line on Exhibit 7 shows dock line on the Wisconsin side?

[Q.] Yes sir.

Q. To avoid getting a lot of documentary testimony with reference to the procedure that was had, I will say to you that we in this case by the pleadings allege and admit certain acts of Congress appropriating money for these improvements and established lines, etc. I want you to state briefly, to avoid unnecessarily extending the record, the method pursued by the Government under the acts of Congress in making these improvements, as to surveys, as to examinations of the waters and all other class of examination, etc.?

Perhaps that was done before this map was made.

70 A. Our harbor improvements required frequent surveys from time to time. We are always continually surveying and re-surveying, and we have to have surveys frequent enough to determine changes which occur and to bring out the necessities of improvements too, and taking soundings, and so——

Q. Observations of the waters?

A. Yes sir, so this ground has been gone over repeatedly, and requires constant attention, almost.

Q. I am asking you, while I think it shows for itself, whether in the making of this improved channel from Superior Bay upwards, whether the deep water channel was in many instances straightened and shortened?

A. It was.

Q. But over the main course of the channel it is substantially the same, that is extending up the waters?

A. Yes, that is true.

Q. I call your attention to the location of what we refer to here as the Island, Big Island, as it is on your map. You know that location?

A. Yes sir.



Q. And to a small horse shoe shaped island between that shore and the Minnesota shore?

A. Yes sir.

Q. You know that location?

A. Yes sir.

Q. I ask you whether the improved channel as made there by the Government was in aid to the betterment of navigation and commerce?

A. Yes sir.

Q. I ask you whether it was made at this point between the shores of Big Island and the Minnesota shore?

A. It was.

Q. And I ask you whether, in the making of that improved channel, whether it was cut through this little island to which I have directed your attention, lying between Big Island and the Minnesota shore?

A. Yes sir.

Q. I will ask you whether in cutting it through, practically all of the island was cut away except the small prong to the Northerly side of the improved channel?

A. We cut out a channel about 200 feet wide and that left some on the North.

Q. And some on the South?

A. And I believe it left some on the South, a marshy portion of it which has disappeared.

Q. Disappeared since?

A. Yes.

Q. Whether or not that which was left has not practically all since disappeared?

A. Yes sir.

Q. Now, generally, was this improvement conducted as to deepening and straightening the channel, by what means?

A. By dredging.

Q. And under whose immediate supervision was the operation of the dredging work conducted?

71 A. There were several employes engaged in different capacities, there was,—in the first place I had a hand in l-ying the harbor line; then when the actual work began under contract the superintendency of it was turned over to another assistant engineer by the name of Dever.

Q. Since deceased?

A. Since deceased, and under Mr. Dever there were Chief Inspectors, one of whom was Mr. G. A. Taylor who is with us today, and who has direct charge and oversight of that work with other inspectors to assist.

Q. And now, Mr. Darling I show you plaintiff's Exhibit 9, which is called the chart of the harbor, which has already been received in evidence. That is a document emanating from your office?

A. Yes sir.

Q. This chart, Mr. Darling, does it at the place in question here, and for some distance each way, does it show the new and improved channel?



- A. It does, yes.
- Q. And shows it colored white?
- A. Yes sir.
- Q. North of Big Island, I noticed a little prong colored in yellow, south of this channel, does that represent that prong or portion of this island that was left on the southerly side?
- A. Yes sir.
- Q. And which has since disappeared?
- A. Yes.
- Q. The prong upon the Northerly side does not seem to show here. And I will ask you what this long stretch of yellow between the white channel and the Minnesota shore represents?
- A. That is deposits from hydraulic dredging thrown up by construction of new channel.
- Q. And is broader?
- A. Yes sir.
- Q. And was at different points along?
- A. Yes.
- Q. So that it has extended up to, or upon perhaps the portion of the island that was left on the Northerly side?
- A. Yes sir.
- Q. And carried all the way along as shown on the chart?
- A. With gaps between.
- Q. I will ask you what effect the construction of the new and improved deep water channel in these waters, along through this region and the deposit of the dredge material, had upon the old channel, deep water channel through these waters?
- A. It has largely filled up the old channel and obstructed it, there being no necessity for its maintenance after the new channel was completed.
- Q. I will ask you Mr. Darling, whether you have during your service here observed the matter of these waters as to the rise and fall of them and as to the current, if there be such, to the westward and eastward, and whether there have been made under your direction, during your service here technical examinations with respect to these matters.
- A. Yes sir, there has been to some extent.
- Q. And you have as part of your duties made these observations with respect to these waters?
- A. Yes sir.
- Q. I will ask you whether these waters from Minnesota Point to the Westward as far up as Spirit Lake, inclusive, or perhaps as far as Fond du Lac, or near there about, are substantially upon the level in normal condition with the [waters] of what we may term Lake Superior proper, east of Minnesota Point?
- A. Yes, sir, I have found it so up as far as Fond du Lac.
- Q. I will ask you if you have had made under your direction simultaneous gauges of the waters including Minnesota Point, at or near Fond du Lac, and, say New Duluth?
- A. Yes sir, at these three points, I have.



Q. And such gauges have by technical means and instruments been made where the water is natural, normal? If they have state it.

A. I will state it this way. Back in 1897 I wished to transfer the levels from Duluth Harbor up to Fond du Lac. I knew from my previous observations that there was practically no current up as far as that, up to the foot of the rapids at ordinary stages of the river, and in order to take advantage of that fact which I had observed before, I established water gauges at Duluth Canal and at New Duluth, at the Railroad bridge and at Fond du Lac, and made systematic observations with the help of an assistant for two months and made observations three times a day at each place, simultaneous observations, of the height of the water, current and wind. And measuring the current by floats I found as I had expected to find the current setting upwards at times, other times downwards and some of the time at slack, and my object was to eliminate the slope entirely and get a surface for transferring my levels to Fond du Lac which would be a more correct way to determine than spirit levels, so I made these observations carefully and have a record of them at our office and I found as I have already remarked the current alternately setting up stream and down stream and slack waters between. But it furnished what I wanted, a very good means of transferring water levels by this level stretch,—by evidence of its being level, the fact of its being slack—is not necessary to be leveled where it is slack a number of hours, and there was the evidence which I wanted for [determining] my levels up there and of which I made use.

Q. Is there a rise and fall to the waters of Lake Superior?

73 A. Yes, sir, there is almost continuous fluctuation of the level of the Lake, rise and fall.

Q. Is there a setting back of the Lake to the Westward as well as to the Eastward?

A. Yes sir, whenever the Lake rises water sets in through the canal and through the Superior Entry at the same time until the water falls in the Lake below the normal level, and then it settles down; that is, it holds out long enough to draw the water of the bays down to its level, but more usually it changes in its level so frequently in the Lake that it does not have time to fill the bays or empty them.

Q. Now, you are not speaking with reference to storms, but with reference to ordinary conditions?

A. Well, these fluctuations and these currents are depending upon a variety of causes, and among these causes are storms like a Southwest wind, will cause a lowering of the Lake, or the action of the wind upon the surface of the Lake and the current setting out, but there are a great many fluctuations of the Lake which have no apparent cause.

Q. Do not depend upon the wind?

A. Do not depend upon the local wind, but quite possibly there are wind storms further down the lake which affect the level, and these effects reach this end of the lake even in a calm at this place,—there are probably storms down the Lake in the nature of a cyclone.

Q. But is there or is there not a movement of these waters apparently independent of wind or storm?



A. Yes sir, there is another good cause which is called changes in barometric pressure, or pressure of the air, which wherever it occurs on the Lake will depress the water or level it to compensate for these changes in the air pressure and that will set up a tidal wave which will reach all directions, and causes these fluctuations.

Q. Is there, or is there not, generally speaking, such a rise and fall in the waters of the Lake at such repeated intervals of more or less regularity so that in common speech they are referred to as the tide?

A. There are those fluctuations regularly and I have never seen any—it is pretty evident that these fluctuations are entirely unsystematic and irregular.

Q. But they are of frequent occurrence?

A. Yes, of frequent [occurrence].

Q. Now, I ask you from the observations and examinations that you have made, what rise of waters at Minnesota Point is felt or noticeable up to what we have been referring to as the head waters, or the head of the Lake, these waters above these bays, to what extent must the water rise for instance before it is noticeable say, at New Duluth or Fond du Lac or when it reaches where this island is?

74 A. I could not tell you just how much of a rise in the Lake would reach up to Fond du Lac, but a very moderate rise would be felt, cause a current up the river.

Q. What would you mean by a moderate rise?

A. I should think a rise of three or four inches for instance.

Q. Would be felt up as far as Fond du Lac?

A. Yes, very likely would.

Q. What are the appearances of these waters as to the matter of formation from below Fond du Lac when we reach what we call here Lake Superior proper, as to whether they have the appearance of an arm, as reaching out into various little inlets and bays, even Lakes in formation; or whether they have the appearance of waters confined within river banks, which is the appearance of these waters. Of course we know how they appear, but I want to have that appear on the record,—take it from Spirit Lake down.

A. It appears to me that for the part above Grassy Point it has more the characteristics of a river than the Bay or Lake, while below Grassy Point it is the reverse, that is, it is not a river in the usual sense of a river, but rather a Lake or a Bay.

Q. Well, above Grassy Point do the waters not extend out into various bays and inlets as for instance, Pokegama Bay and other bays to the east of it, and do they not separate out into extensions of water like Spirit Lake and other small bays all along?

A. Well, there are these minor bays running back in the land, and Spirit Lake is a lake by itself. Well I have always held it is properly a river over that part of the territory, river with quite widely spread flats of shallow water across, well defined channel. While below Grassy Point there is an absence of well defined channels and large enough body of water to form lake or bay in St. Louis Bay and in Superior Bay.



Q. There are no river banks, are there, like there are above Fond du Lac, after the waters strike the level of Lake Superior?

A. There are river banks over portions of this distance, just opposite Spirit Lake.

Q. Yes, I understand that that is on the Wisconsin shore there?

A. Yes sir.

Q. And the formation of the low stretch of land around the curve Southeastward of Spirit Lake?

A. Yes sir.

Q. I will ask you if there has not been at times connections through that low stretch of shore along the westerly side of the channel in the Spirit Lake so that men have gone in in little boats?

A. Well, it may be that in times of high floods the water overruns this low marshy ground.

75 Q. What is the distance, if you know between Big Island and the Minnesota shore across where this island was?

A. Well, I have not determined the exact distance, but looks about 2,000 feet.

Q. And the distance across Spirit Lake, longest distance?

A. It is nearly 3,000 feet.

Q. Nearly 3,000 feet?

A. Yes sir.

Q. And such deep water current as existed through these waters originally and before the Government made the improved deep water channel was very tortuous through there, was it not?

A. Yes sir.

Q. Some times reaching close to the Minnesota shore and some times much closer to the shore of Big Island?

A. Yes sir.

Q. And then back again to the Minnesota shore?

A. Yes sir.

Q. And a like channel to the Southward of Big Island?

A. Yes sir.

Q. There are no banks there of a river, are there, other than the shore of Big Island and the Minnesota shore at this point?

A. Not at that point.

Q. At a point not far from the southerly end of Big Island or near the south end of Big Island, the waters that were passing between the shore and this low curved reef, shown on map Exhibit 9 to the Southeast of Spirit Lake, mingle with the waters of Spirit Lake, and connect with the waters of the Pokegama, do they not to the east of the island, that is, what I mean, I will put the question a little different. Coming around between the Wisconsin shore and this little reef you mention banks, when you arrive at the Big Island you come into open water at Spirit Lake, and you can also pass to the southeast of Big Island through open water in the Pokegama.

A. There is no opening of any depth from Spirit Lake, it is very shallow so that this water does not enter Spirit Lake there to any extent, I do not think.

Q. Well, it is all open water, I am not speaking of the depth of Spirit Lake, but it is open here?



A. No land but very shallow.

Q. Is it open water to the vision?

A. Yes sir.

Q. And open through the Pokegama to the Southeast of the island?

A. Yes sir, the water would mainly go down to the newly dredged channel, and in some particular to the South channel, and a very inconsiderable part might go into Spirit Lake.

Q. If the waters between Minnesota shore and Big Island or to the westward and northward do not open to the full width, leaving out what has happened by dredging, into Spirit Lake, as you  
76 pass up by this little island and through where it is now the new channel, between the Minnesota shore and big island, would you not come into the open water at Spirit Lake, practically the full width between Minnesota shore and Big Island.

A. I would hardly say the opening was full width, because it is a rather restricted opening.

Q. Couple of thousand wide, if this is 3,000—

A. Not as wide as that, 1,000 would come near to it.

Q. But you measure in that 1,000 feet to the little point extending on one side?

A. Yes sir.

Q. But take the main width, not confining yourself to a little swampy point?

A. Well, it branches off, part of it goes up river outside of Spirit Lake, and there is an opening in Spirit Lake which has always been hard to get in.

Q. Shallow?

A. Yes sir.

Q. And the new dock line which you have shown upon the map, Exhibit 6 extends in however, right through Spirit Lake, does it not, the new dock line?

A. Yes sir.

Q. Extends through and heads for the opening where the boat club is now located?

A. Yes sir.

Q. In the construction of these improvements, Mr. Darling, through this place in question, when you came to this low marshy island, between Big Island and the Minnesota shore, did or did you not apply to anybody for permission to scoop it out?

A. No sir.

Q. Did you or did you not treat it the same as any other portion of the bed of the water?

A. Why, we considered that the land belonged to the Government, all to the Government and we did as we chose with it.

Q. Well, then, will you answer whether you treated it the same as the rest of the bed?

A. We went right through it.

Q. Far as you know, nobody [question-] your right to do it?

A. No sir, nobody questioned it, cut through that just as we cut



through the island at the head of the Hay Lake, channel down St. Mary's River.

Q. You encountered this piece of land showing its face above water, same as you encountered land covered by shallow water and dredged it out?

A. It amounted to the same thing, little more digging.

Q. And the present navigable and navigated channel at the place in question is through improved channel shown on this map?

A. Yes sir.

Q. And is between the dock lines as shown on the map?

A. Yes sir, that's right.

77 Q. There is one other question I want to ask Mr. Darling, for fear I [didn't] make it plain, I don't know but I did. This map, Exhibit 9, in so far as it shows this little stretch of land on the Northerly side or toward Minnesota shore, does not purport to show the land originally and naturally, but after the dredging work was done?

A. That is it exactly.

Q. And this map, Exhibit 9 was made subsequent to your improvement and shows all the different scenes [as] with respect to such matters rather than prior conditions, or in its natural condition?

A. That's true.

#### Cross-examination.

#### By Mr. HARRIS:

Q. Mr. Darling, referring to plaintiff's Exhibit 9, this wide strip on this Exhibit running between Big Island and the Minnesota shore, what does that represent?

A. It represents the Government dredged channel.

Q. What do these dotted lines crossing and re-crossing that wide strip indicate?

A. That indicates the original natural channel.

Q. The original natural channel?

A. Yes sir.

Q. So that at certain points between Big Island and the Minnesota shore the old original channel is nearer the Minnesota shore than the present artificial channel, and at other points the old channel is nearer Big Island than the Minnesota shore?

A. That's true, yes sir.

Q. I will ask you whether or not this old main channel between the small island which Mr. Washburn has inquired in regard to, is still open between that small island and the Minnesota shore?

A. It is open for a portion of its distance and closed for the remainder of it. Closed by the artificial fill from dredging.

Q. I suppose you have not made any exact measurements to see to what extent that channel is still open or closed by the fill, have you?

A. No sir.

Q. On this Exhibit 9 running off into Pokegama Bay and into



Kimball Bay and into other small bays and indentations running up by Billings Park, I notice there are certain black lines, broken to a certain extent; I will ask you what those lines indicate?

A. They are Government Harbor lines established in 1899 by the Secretary of War.

Q. Not yet dredged out?

A. Not dredged out.

Q. What were these lines established for, what was the ultimate view in establishing these lines?

A. To give access to these bays when required.

Q. I will ask you how long have you been engaged with the Government here, Mr. Darling?

A. Twenty-six years.

78 Q. And you have made the recommendations from time to time to the War Department with reference to the laying out of the harbor lines so as to get riparian rights?

A. Yes sir.

Q. I ask you whether or not, taking this territory that lies between Grassy Point and what is marked as Mud Lake on Exhibit 9, it would be possible to give [all] to all of the territory surrounding that basin its proper riparian rights by dredging out one single main channel?

Mr. WASHBURN: I will have to object as incompetent, irrelevant and immaterial, not within the issues of this case, and because it includes the opinion and conclusion of a witness as to what are proper riparian rights, questions on which he has not testified.

Mr. HARRIS: Strike that question out.

Mr. HARRIS:

Q. Assuming, Mr. Darling, that all of the territory between Grassy Point as shown on this Exhibit 9, and Mud Lake as shown on this Exhibit 9, is entitled to riparian rights, I will ask you whether or not all of that land on either side of the river between those two points could be properly [accom-odated] by the dredging out of one single main channel?

Mr. WASHBURN: That is objected to as wholly immaterial.

[Q.] I thing it would require more than one channel to properly [accom-odate] them.

Mr. HARRIS:

Q. And is that the reason why the Government has laid out these various dock lines and channels, to reach these irregular tracts caused by these indentations?

A. Yes sir, that is the reason.

Q. Do you know what is the level of Lake Superior at Duluth, we will say at the Government Canal, above the Atlantic Ocean?

A. It is about 602 feet.

Q. Do you know what the level [iof] the St. Louis River is at Fond du Lac above the Atlantic Ocean?

A. For ordinary stages of the St. Louis River it is the same as Lake Superior within a [vary] small amount, a fraction of an inch.



Q. Have surveys been made, actual surveys?

A. My reasons for stating that are not from my observation of the absence of a current.

Q. Has the Government here, to your knowledge, Mr. Darling, ever made a survey, starting at the ordinary level of the water as it extends out through the Government Canal and made to Fond du Lac a survey to find if there was any rise or fall?

79 A. I don't know that there has been any run so far as that.

There has been as far as New Duluth, but not as far as Fond du Lac. I have assumed a high tide in these observations I testified to, that where the water is slack for a considerable period of time during the day, you can assume still water is known to be level.

Q. Do you know what is the height of St. Mary's above the ocean?

A. That is considered to be the same as it is at Duluth. The entire body of Lake Superior, the surface of Lake Superior is supposed to be level.

Q. Where do the waters from Lake Superior flow, will it always remain in Lake Superior?

A. It flows out through St. Mary's River.

Q. Will it reach St. Mary's River and on to the St. Lawrence River?

A. No, No sir. All this water in the bed of the Lake may be quiescent,—a very slow movement through the lake, through the head of the lake to St. Mary's River.

Q. But there is a constant flow from the head of the Lake to St. Mary's River?

A. Yes sir, and theoretically there might be a slope or fall having a definite relation to the cross section of the lake and the discharge. I figured a little on that once to see what that would figure out opposite Keweenaw Point and it is so small it is infinitesimal, practically. There is something on this line between Lake Michigan and Lake Huron in the Straits of Mackinaw, there is a part there, a channel where there must be a flow through it that has been computed and found to be practically level without any possible discharge from it. I mention this to give you a little idea of how a large cross section reduces a slope to almost zero. Now in Lake Superior it is far less and practically infinitesimal.

Q. From your observations and from your experience Mr. Darling where would you say the waters that flow by Fond du Lac ultimately wind up, where would they go ultimately, would they remain there permanently? Where will that water ultimately wind up?

A. It finds its way down through the St. Lawrence River and ultimately to the Ocean, some of it is evaporated, forming clouds.

Q. If you were to place a boat, place a boat or a log or a piece of timber in the waters opposite Fond du Lac, and assuming that it did not catch along the shore anywhere, where would that log go, would it remain stationary there or would it ultimately find its way into some other body of water?

80 A. The flow of St. Louis River alternate up stream and down stream and finally it would find its way out into Lake Superior.



Q. Is there any tide in Lake Superior, such as the ocean tide?

A. There is undoubtedly a small tide, a solar and lunar tide, a tide which is similar as far as cause and effect are concerned, to the ocean tides, but on a much smaller scale and amounting probably to only about two inches at Duluth. The Magnitude is very hard to determine on account of it being [obscured] by oscillation from wind effects.

Q. You said at times there was an appreciable rise of the waters inside of Minnesota Point when the waters in the Lake were comparatively still, have you ever made inquiry, Mr. Darling, as to what the condition of the water was on other parts of the Lake, lower down the Lake when those rises have been noticed, and do you know that the rise was not occasioned by Northeast storms on the lower end of the Lake?

A. I think there has been times when there was what was called tidal waves coming into Duluth and I traced it up further down, but I can't answer that question very definitely. Most of those fluctuations though appear to be independent of prevailing winds or storms down the Lakes, fluctuations from perhaps local storms, something like a cyclone, which is ample to create a fluctuation of the lake to a rather moderate extent.

Q. If the general trend of the waters of Lake Superior being Eastward and through St. Mary's channel or River, what cause aside from weather conditions can you give that would at any time cause the current or flow of water to be Westward.

A. Aside from winds?

Q. Yes, aside from winds or weather conditions?

MR. WASHBURN: I will object to it as incompetent, founded upon a statement and assumption of facts not shown.

A. I know no cause aside from weather conditions.

Q. What is the fall in St. Mary's River, do you know, Mr. Darling?

A. There is a fall of something like 20 feet I believe, including the fall at St. Mary's rapids.

Q. In what distance?

A. Oh, a distance, let me see,—well I have forgotten how long St. Mary's River is, it may be fifty miles, I don't know how long it is.

Q. You have been to St. Mary's frequently?

A. Well, yes.

Q. What is the size of the river? In width, say?

81 A. I should say it is half a mile to a mile.

Q. And what is the depth of St. Mary's?

A. Something like 20 feet and upwards.

Q. Does all the water that goes through that river come out of Lake Superior?

A. The greater part of it does.

Q. Except the small tributaries; but the great bulk of water that goes through St. Mary's River comes out of Lake Superior?

A. Yes sir.



Q. And it is a rapid flow is it not?

A. It is a rapid flow at the Soo, and below that a very moderate current.

Q. Now that great body of water going out of Lake Superior and feeding St. Mary's River would it not lower the water at the end of Lake Superior?

A. It would lower it at the upper end of St. Mary's River and at the lower end of the Lake sufficiently so that the cross section and discharge will be appreciable and would produce a slope there. It would be a place where it is very narrow.

Q. Well, as that water goes into St. Mary's channel naturally the water behind in Lake Superior follows it up?

A. Yes sir, of course. I don't say there will be any appreciable slope until you get past White Fish Bay there at the narrows, and would produce a slope.

Q. You think from that point on there might be a slope?

A. From the head of the river down to the Canal.

Q. Do you know what was the average depth of the waters inside of Minnesota Point before they were dredged out by the Government?

A. That is in Superior Bay?

Q. Yes, take Superior Bay?

A. Why, something like six to ten feet with some deeper portions.

Q. What is the depth of water a few hundred feet outside of the old Superior Entry?

A. A few hundred feet out, well might say it is fifty feet,—twenty-five, fifty and drops off materially as you get out.

Q. Drops off rapidly?

A. Very slowly.

Q. Suppose you get out one thousand feet what would your depth be?

A. I should say it might be fifteen feet, rough guess.

Q. What is the depth down here near Duluth, what was the depth where this vessel sunk a few years ago?

A. Sixty or Seventy feet of [w-ter] about a mile out.

Q. What was the depth of water a mile off from the Duluth Canal?

A. About seventy feet a mile off. It drops off a little more rapidly near the shore and then as you get out it does not change  
82 very much, you have to go about six miles to get 100 feet.

Q. If you know, what was the width of the old natural channel where the water inside of Minnesota Point emptied into Lake Superior, between Wisconsin and Minnesota Points?

A. The original width was somewhere near half a mile, mostly shallow.

Q. What was the width of what you call the channel?

A. The channel proper, a few hundred feet wide I should say.



Redirect examination.

By Mr. WASHBURN:

Q. These dock lines, maps to which counsel called your attention, from the chart, are shown on map Exhibit 7, showing on the Wisconsin side, are they not.

A. Yes sir.

Q. And they are but the extension of the dock lines, the Wisconsin dock lines?

A. Yes sir.

Q. You don't close it in around, but extend up the Bay?

A. Yes sir.

Q. These were put in where it was considered that there should be kept an opening into these bays, not closed by any private improvements?

A. That's it.

Q. I want you now to state again Mr. Darling what you said a little while ago in answer to counsel, which was not said in answer to a question for the record, with respect to this trend of the waters of Lake Superior to the eastward that seems to have some sordid interest for him as to the slope of the water, as to the level of the waters to the easterly and westerly ends of the Lake?

A. I consider that the surface of the Lake is appreciably level, so closely, as nearly level that any observations can be discounted from one end to the other until you get into St. Mary's River, and that the water flowing into the Lake at the upper end at Duluth and St. Louis River, and all rivers and moving through the Lake as they do ultimately, do not appreciably affect the level of the lake or produce a perceptible slope in the lake.

Q. These are currents in the lake, are there not?

A. There are some slight currents, what might be called surface currents caused by wind.

Q. Is there not such a thing as a current to the east on the south shore and to the westward on the North shore?

A. I don't believe there are any prevailing currents in any part of the lake. Whatever currents there are are direct effects of the wind acting upon the water, and that the wind always pushes the water ahead and that there is a return current.

83 Q. Do you lose the current in these waters which my brethren call St. Louis River, but which I do not, above Grassy Point, do you lose the current?

A. Above Grassy Point lose the current, the current of the River?

Q. What they call the river West of Grassy Point?

A. Oh, there is a slight current of the river there, bound to be as long as there is any discharge.

Q. Do you substantially lose it at the point where you felt disposed to call it the Bay, this side the river, east of Grassy Point?

A. Why, there is practically no current to amount to anything in the ordinary flow of St. Louis River from the Lake up to Fond du Lac.

Q. And practically no slope to the waters?



A. Practically no slope,—there is a small slope.

Q. And the movement of the waters as counsel has referred to in his question and as you have referred to in your answers to the east in the Lake is scarcely appreciable?

A. In the Lake, yes.

Q. And the flow of water out of St. Mary's, you have described the water as rapid?

A. The flow?

Q. Yes.

A. The steady flow, large flow there.

Q. And at times it has not been necessary to close down their plants that depend upon that flow for supply of water power?

A. Oh no, never has been enough draft on the flow to require that.

Q. The use of this water for the plant there in the improvements has been prohibited this summer?

A. There has been some regulation that way, but I don't think any stoppage; well I don't know the most recent action in regard to that.

Q. What do you refer to as the St. Mary's River, the waters from Lake Superior to Lake Huron?

A. Lake Superior to Lake Huron.

Q. And somewhere down that body of water or stream of water, the currents cease, do they not, that is to say as the rapid flow ceases and the waters become practically dead level waters?

A. Through Hay Lake, undoubtedly. There is a very slight current on account of the expense of the river and wherever the river enlarges to a considerable size the current diminishes.

Q. Are you as familiar with these waters as you are here?

A. No sir, I have not given much study to St. Mary's River. I know there has been more or less consideration of the question of controlling the power companies throughout St. Mary's River, and really I can't say just what the decision is.

Mr. HARRIS:

Q. You know that there is always a sufficient volume of water from Lake Superior into St. Mary's canal and river so that there has never been any interruption of navigation, even for the largest vessels from Lake Superior into St. Mary's canal or from St. Mary's Canal and River into Lake Superior?

A. To the best of my knowledge there has been no interruption of that kind. I know that during a time when that water power company on the American side was under construction the question of location,—and plans were made for such location.

Q. Do you know whether or not any calculations have ever been made as to the hourly or daily flow of water through the St. Mary's River?

A. Oh, yes, they are on record.

Q. Do you know what these calculations show.

A. I have seen it,—the measurements of discharge there.

[A]. In cubic feet?

A. In cubic feet per second. I don't know as I could tell now, I



think it is upward of 100,00- cubic feet per second. If I were at the office I could tell you exactly.

Q. Is there a well defined channel all the way from Fond du Lac, I am speaking now before the artificial channel was dredged out, was there a well defined channel from Fond du Lac down to Grassy Point?

A. Yes sir, there was.

Q. What creates this channel when you have an expanse of water running,—what creates this channel?

A. The scouring action of the water current, especially in times of flood. It is usually limited to flood periods.

Q. I will ask you whether or not there wasn't,—while the channel might not have been so well defined through St. Louis Bay, do not the soundings and plans show that there was a channel even through St. Louis Bay before the creation of the artificial channel?

A. The surveys show portions of a channel, the old maps show a channel which dies out or disappears in the broad expanse of St. Louis Bay. It soon disappears and then there is a stretch through the body of the Bay where there is no channel at all.

Q. Is there one through Superior Bay?

A. There is a channel through Superior Bay.

Q. And a marked channel and current through the entry and out into Lake Superior?

A. Yes sir.

Q. And is it not still apparent for a considerable distance out into the Lake?

A. Well, for a very short distance, I should say.

85 Q. Is it not apparent at the artificial canal?

A. The current is apparent at times, especially when there is a flood discharge in the Bay, you can see this current out for quite a distance in the Lake at times, but it is very soon lost in the body of the Lake.

Mr. WASHBURN:

Q. And through the Superior Entry it is sometimes outward and sometimes inward, is it not?

A. Yes sir, that is true.

Q. And the current through the canal is the same?

A. Sometimes outward and sometimes inward. And for the ordinary flow on St. Louis River it is as often in as out. In time of floods in St. Louis River it prevails outward.

Mr. RICHARDS:

Q. Calling your attention to the Plaintiff's Exhibit 7, I ask you to explain the figures given in various places along the water surface, following down the red lines?

[Q]. Those figures show a depth of the water in feet.

Q. And calling your attention to that part that is marked St. Louis channel, near Big Island, there is a great difference in the depth of the water in the channel and the adjoining—

A. Oh yes, there is a decided difference.



Q. And speaking generally of all those Exhibits, these figures mean the depth?

A. Yes, sir, that is what they mean.

MR. HARRIS:

Q. Asking you about the channel that loses itself in the Westerly part of St. Louis Bay; does that channel appear again, it is [visible] at the easterly end of St. Louis Bay as you approach Connor's and Rice's Points.

A. It does appear.

Q. And continues on through between these two points out at the old entry?

A. Yes sir.

Q. Before the canal, the artificial canal was cut through, was there any channel running from the end of Rice's Point?

[—]. No, no channel in the north of Superior Bay?

Q. There is no such channel in Lake Superior, that you know of?

A. I have heard, and I believe it is correct, that there is an old river channel running out into the bed of the Lake, it indicated a former location of the river itself, probably the time when the land was high, the relative position of land and water was different.

Some say the water was lower in Lake Superior than it is now, and there are other indications of that, and I think this channel which you mention in Superior Bay is a relic of a former river when the water was lower, or ran through a marsh.

Q. There have been changes going on in the past?

A. Yes sir. I should say prehistoric, because we have no record of it in history.

MR. WASHBURN:

Q. Your idea is that in so far as there is a channel in there, that it is a relic of some channel that existed before the lake came up, when the lake was lower?

A. When the lake was lower?

Q. Yes?

A. There is some reason to believe that there is a tilting of this part of the country coming up toward the West or Southwest of South, which tends to cause a rise of the surface of the lake at this end, there is some evidence to that effect in the case of the lower lakes, and I have thought I detected some indications of it here at Duluth from our gauge readings here and at Marquette, and if I could live long enough, 100 years or so I think it could be proven.

Q. Your idea is that the lake extends up and that these waters from the lake extend over through what we refer to at this point, higher than it used to be some years ago?

A. Yes, I think there is some evidence to that effect.



G. A. TAYLOR, called as a witness on behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination.

By Mr. WASHBURN:

Q. Your name is G. A. Taylor?

A. Yes sir.

Q. And you reside in Duluth?

A. In Duluth.

Q. How long have you resided in Duluth?

A. Seventeen years.

Q. You are in what employ?

A. United States Engineer's Office, at Duluth.

Q. We may truly say then, I suppose with the United States Government, and engaged in the Engineering Department.

A. Yes sir.

Q. In the waters at the head of Lake Superior?

A. In the district.

Q. What do you call the district?

A. Upper Lake Superior and in the United States.

Q. You were in the immediate [superintendence] and operation of the dredging work in the district of the improved channel in these waters extending westward from the Duluth Harbor up toward, and to perhaps, Spirit Lake?

87 A. Yes, sir.

Q. And at the place here in question between Big Island and the Minnesota shore?

A. Yes, sir.

Q. Tell us when the improvement was made?

A. It was begun in 1899,—part of the work was begun originally in '97.

Q. And when was it done through between Big Island and the Minnesota shore?

A. It was in process from 1899 to 1902.

Q. The dredging was carried on by what means?

A. By means of hydraulic and dipper dredging.

Q. And the dredge material was then deposited where, along the place in question here?

A. The hydraulic dredging material was deposited in flats outside of the Harbor line.

Q. That is the place here in question, on the Minnesota side?

A. Yes, sir.

Q. You remember the little marshy island between Big Island and the Minnesota shore?

A. Yes, sir.

Q. And you were in charge of the work when that was dredged?

A. Yes, sir.

Q. I will ask you if at that time any portion of the land was left on the South side?

A. Yes, sir.

Q. Assuming that this is fairly represented on Plaintiff's Exhibit



8, that it fairly represents the shape of that Island as it appeared before the dredging, I will ask you if the construction of the new deep channel was such that it took out the main body of that island, leaving the prong on either side?

A. Yes, sir.

Q. And whether or not the prong on the south side has since disappeared, or practically so?

A. Yes, sir.

Q. And if the deposit of the material as you have mentioned on the North side and outside Harbor line, has operated to build up to and extend and entirely change the shape, along a stretch of land extending for a long distance substantially parallel with the new channel.

A. Yes, sir.

Q. What effect has that dredging had upon the old channel, the deep water channel?

A. At that particular location it filled up the old channel at its upper outlet into the new channel.

Q. And what has been the effect as to whether or not the old channel is usable now?

A. A boat can go in there back of that island, but can't get out at the upper end.

Q. Can't go far there, can it?

88 A. It can go in between the island and main land.

Q. And that's about all?

A. Yes, sir.

Q. Yes, it was not found practical, was it, to keep, or try to keep the old deep water channel and the new deep water channel both open?

A. It was thought advisable to close the old channel at the upper end where it is possible to confine the waters to the new channel.

Q. And the present navigable and navigated channel is the improved one, made by the Government as described by Mr. Darling as shown on these maps?

A. Yes, sir.

Q. And the channel is between the dock lines,—established on either side?

A. Yes, sir.

Q. And when you come to this Marshy island, you [scooped] it out?

A. Yes, sir.

Q. And the work was treated by the Government, was it, the same as any other portion of the submerged land?

Mr. RICHARDS: I object to this as a conclusion.

A. Yes, sir, I might say in this connection, if I may be allowed, that I had nothing to do with the nature of the land or anything of that kind.

Mr. WASHBURN:

Q. When you came to it you scooped it out the same as submerged land next to it?



A. Yes, sir.

Q. This part of the work at this location, was this done in 1902?

A. Between 1899 and 1902.

Q. Naturally this is a matter of three [years'] work what this land cut through?

A. Well, it was cut through early in the operation, with the first cut, but operation of dredging a channel of that width takes considerable time, and while we take and cut for a long distance, maybe for a mile, and we take that cut through the island and go there again, and this work was in progress for three years.

Q. So that you would say that this work was going on from some time in 1899 to 1902.

A. Yes, sir.

Q. And prior to the beginning of the work in 1899, was the shape of that island before you began the work substantially as outlined on that blue print map?

A. Yes, sir, there might possibly have been a little work done in 1898, but I think no work done that far until 1899.

Q. And after the work was done and the island dredged, the only portion of the island left on the North side was that little prong extending off to the Northeast?

A. Yes, sir.

Q. And then by the dredging, the depositing of the dredge material up to and upon that, and extending to the westward, is the reef of land shown on the chart was made?

A. Yes, sir.

Q. What was the shape of the island itself,—or what was left of the island is entirely gone?

A. Yes, sir.

Q. Were you there practically day after day, week after week?

A. I was there nearly every day.

Q. And in charge of the work?

A. Yes, sir.

Q. This island as you encountered it, was it practically as described by witness, practically all marsh?

A. The portion of the island that was dredged out was practically all marsh, some of the North portion was not marsh.

Q. Had a small growth of brush on it, alder and willows?

A. Yes, sir.

Q. Did you notice a cabin on the island?

A. Yes, sir.

Q. What character, describe it?

A. Why, it was a one room building, my recollection of it would be that it was about ten by eighteen perhaps, one story, set on some posts.

Q. Was that burned after the work was done?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. And have you noticed at any time whether there has been another built there?

A. Yes, sir.



Q. When was that?

A. I can't say when it was built, it was there in 1906, but between the completion and 1905, I was employed on other work and was not in that vicinity much.

Q. This cabin in 1906,—what manner of construction was that?

A. It was a board structure, somewhat smaller in size to the old one, one story building.

Q. Flat roof?

A. No, I think it is a peaked roof, tar paper roof.

Q. Is that last structure over on the filling made by the Government?

A. It is further to the South, whether it is on the filling or not I don't know, further to the south than the old one.

Q. You heard Mr. Darling's testimony given here?

A. Yes, sir.

Q. And testimony with reference to these waters were being practically on a level with Lake Superior?

A. Yes, sir.

90 Q. That is true, is it?

A. To the best of my knowledge.

Q. Rise and fall with the Lake?

A. Yes, sir.

Q. With reference to whether the rise of two or three inches in Lake Superior at Minnesota Point would be shown to effect the waters above as far as New Duluth or Fond du Lac?

A. I think that depends largely upon the fluctuation in the Lake?

Q. It would appear, however?

A. It would if the water of the Lake remained high long enough.

Q. And you have heard testimony with reference to the current flowing easterly and sometimes [westerward] through these waters?

A. Yes, sir.

Q. That's true, is it?

A. Yes, sir.

Cross-examination.

By Mr. RICHARDS:

Q. Can you state, Mr. Taylor, just when the first cabin you spoke of was burned?

A. No, sir, I can't.

Q. Can you state just when its successor was built?

A. Not exactly.

Q. Well, was there more than a year elapsed between when there was no cabin there. Would like to have you approximate as close as you can the time there was none there?

A. I was not present there,—that part of the work from the fall of 1902 until 1905, don't think I was up there at all during that time.

Q. Are you positive that it was built in a new location?

A. Yes, sir.

Q. Did you ever make any survey of that island to show the



amount of land it contained, the land remaining North of the dock line after the original channel had been built?

A. The survey was made under my immediate direction, showing the shore line there as shown on this chart, but not as showing the portion of the original island that was left.

Q. Is the channel, that portion of the old original channel that was left when filled by the deposit of the material that you dumped in, closing the upper end, where it is open and left open,—is it of the same depth that it was before, do you know?

A. Practically, except where there was dumped,—

Q. And you stated the boats could get in behind the island, up in that old channel?

A. Yes, sir, boats of draft such as could go in the old channel,—

91 Q. I was going to say, what is the depth of the new channel in the neighborhood?

A. Twenty-one, twenty-two feet,—supposed to take a boat twenty feet of water.

Redirect examination.

By Mr. WASHBURN:

Q. The time you say you left was after the work was completed up there?

A. Yes, sir.

Q. As a matter of fact, after the depositing of the Government dredging material it would be quite impossible to determine, would it not, going there afterward, how much of the old island was left on Northerly side, it being now a continuous stretch of made land?

A. Yes, sir, it would be difficult.

Q. And even now on the main land there is [same] small growth of vegetation appearing, is there not?

A. Yes, in a way, of course.

Q. And brush to some extent?

A. I have not noticed any brush.

At which time court adjourns until Ten o'clock A. M. Tuesday, July 19th, 1910.

C. A. PEARSON, called as a witness on behalf of the plain'tiff, being first duly sworn testifies as follows:

Direct examination.

By Mr. WASHBURN:

Q. Your name is Charles A. Pearson?

A. Charles A. Pearson.

Q. Where do you live, Mr. Pearson?

A. Duluth.

Q. How long have you lived up here?

A. Nineteen, possibly twenty years,—nineteen or twenty years.

Q. Will you state whether, during your residence here you have



been to a considerable extent engaged in pursuits that have carried you into the forests and into the country Northwest of Duluth?

A. For the last fifteen years, barring five or six years, I was engaged with the Pearson Boat Construction Company, most of my time was spent in geological work.

Q. In this region?

A. In this region, in the Northwestern part of Minnesota and Northeastern part of Minnesota, and also some parts of the time outside of the state.

Q. And you are more or less familiar with the territory traversed by the St. Louis River?

A. Yes, I am.

92 Q. Have you encountered the river in various localities, you have been in the territory North and Northwest of Duluth?

A. I have traversed a portion of the St. Louis River between Fond du Lac and Duluth and I have traversed it a good many times.

Q. And how about North of Duluth, have you encountered the river at various locations?

A. I have, I have paddled the St. Louis River from the junction of various rivers to Floodwood. That portion of the river between Floodwood and Fond du Lac, I have visited on the banks at several places.

Q. The river above Fond du Lac, is it or is it not in the main a rapid flowing stream?

A. It is.

Q. And confined within well defined banks?

A. Well defined.

Q. And some places high and rocky?

A. High.

Q. And embracing in its course, rapids and water falls?

A. Yes, sir.

Q. Do you know approximately the fall of the river from the neighborhood of Cloquet to Fond du Lac?

A. I believe Cloquet is 1300 to 1350 feet and Lake Superior about 601.

Q. You mean above the level of the sea?

A. Yes, above the level of the sea.

Q. From Fond du Lac, or this side, of Fond du Lac down, state whether the river is substantially upon the level, or the waters [deom] that point down are practically level with what we might call Lake Superior proper, east of Minnesota Point?

A. I should say no perceptible drop between Fond du Lac and Lake Superior?

Q. And by Lake Superior as you now use the term you mean Lake Superior proper, east of Minnesota point?

A. Yes, sir.

Q. State to the court what the *the* general appearance of these waters after leaving Fond du Lac and coming this way is, as to whether they are any longer in well defined banks and stream flowing between them?



A. The river is well defined to Fond du Lac. The banks are well defined, but from Fond du Lac down the banks are not well defined, the river spreads out to a low marsh, and the whole valley you might say looks to be an arm of Lake Superior to me.

Q. Have you made some geological study of this section with reference to these waters and shores of Lake Superior?

A. Well, I put in a great deal of study on the beaches of this country in connection with H. W. Pearson. Made that a study for twenty years or more. We have our records of over thirty distinct beaches on the North shore of Lake Superior.

Q. What does that indicate?

A. Indicates different stages of the level of Lake Superior. We have drilled Southwest of Duluth twenty-four miles or more with an elevation of 600 feet and we found well defined beaches with deposits of gravel, agates and such as you would find on the shore of Lake Superior today: that would indicate an ancient beach. The same conditions of beaches have been found on the North shore of Lake Superior in the neighborhood of Grand Marais at an elevation of 150 feet, rough estimate, above Lake Superior.

Q. Your view then, is, that in former periods the waters of Lake Superior were much higher.

A. Oh yes, yes, sir.

Q. Then to go back to this territory covered by these waters this side of Fond du Lac, state whether there are bays and inlets extending far up in places, making irregular points of water which you have indicated as having the appearance of an arm of the Lake?

A. The irregularity of the shore line starts this side of Fond du Lac on the other side of the river. The most prominent bays you will find on the South shore, the South side of the river, most of these bays extend inland a mile I should say.

Q. Are there many little streams flowing down into these waters from either side, small streams?

A. Yes, there is a stream which I have run a small streamboat into for 1,000 feet, that river tributary to the St. Louis in the neighborhood of New Duluth. On that there is a small tributary coming into that Bay just West of Little Pokegama, also a tributary coming into the Pokegama, and quite a stream coming into the head of Big Pokegama.

Q. By Big Pokegama you mean Pokegama Bay?

A. Big Pokegama Bay, yes.

Q. You remember where the deep channel runs around close to the Wisconsin shore and into the Southward to what is called Spirit Lake?

A. Yes.

Q. And do you remember a reef of low land on which there is growing more or less [vegetation] and some trees in places, as you come in that deep channel toward Big Island?

A. Yes.

Q. Is it, or is it not true that in places and for some distance that little reef of land is very very narrow?



A. Yes.

94 Q. Have you at different times, or have you not seen it overflowed with water in places?

A. I have seen the entire St. Louis Bay Basin overflowed so I could paddle over most any of these grounds.

Q. Well, we have in common speech here, at times referred to these [w-ters] these upper waters as St. Louis River, we have also referred to the waters Grassy Point or upward from Grassy Point and between Grassy Point and Spirit Lake, extending Northward of the Big Island, as Upper St. Louis Bay. So, directing your attention to the locality I ask you whether aside from some marshy points that extend out on one side or the other, or both, whether the waters we have referred to here as indicated by me as upper St. Louis Bay do not open into Spirit Lake practically the full width?

A. They do.

Q. And whether Pokegama Bay, which extends out into the Wisconsin shore, and into which stream flows as you have indicated, whether that is not connected with Spirit Lake by a channel on the South side of the Big Island?

A. That is connected. Place in the river, I think it is right in here some place (indicating on map), the mouth of the Pokegama.

Q. What is the [n-me] of that stream that flows into the head of the Pokegama?

A. We call it Pokegama.

Q. Do you know,—you were engaged for some years in the construction of water craft?

A. Yes, sir.

Q. Building for navigation of these waters?

A. Yes, sir.

Q. And your plant was located on the Minnesota Point?

A. Yes.

Q. And on the Bay side of the Point?

A. Yes.

Q. Some witness,—some witness has said that this Point extends in length something like seven miles, is that substantially correct?

A. Yes, sir, it is.

Q. And do you know about the width, generally speaking, approximately speaking?

A. Well, approximately speaking from 300 to 1,500 feet.

Q. Where the widest?

A. If I remember right there is quite a wide point North of the Superior Entry, 1,500 feet, may be, that is over a quarter of a mile, I think I have traversed fully a quarter of a mile.

Q. What is the formation there?

A. Sand principally on the upper level, as you get down you strike gravel, you strike hard pan further down.

Q. Is there a percolation of water between the Lake and Bay?

A. There is, yes.

95 Q. How far down do you go to get water?

A. Just a few feet.

Q. To the level of the water?

Q. To the level of the water. I imagine some of these sand banks



are piled up fifteen feet above Lake Superior Mr. Washburn, but other places are only a few feet, the sea has broken through.

Q. Geologically speaking what have you to say with reference to the formation of those points, Minnesota and Wisconsin, with reference to age?

A. They are quite recent in my estimation.

Q. Of course, by saying quite recent you don't mean within the last fifty or sixty years?

A. No, in my estimation, I would not. Our best astronomers say we have a twenty-two hundred year cycle. They figure that our last period was only about twelve hundred years. Our astronomers have got that figured out.

Q. The only thing I want to get at Mr. Pearson, is whether in your estimation these points of land have been of a comparatively recent formation as compared with formations about the Lake?

Q. Yes, in comparison we of course have one of the oldest formations on the continent, you might say.

Q. Do you know a place on this point called the barrens?

A. Not by that name.

Q. Do you know a place where it is all sand, no vegetation?

A. Yes, that is down on Minnesota Point, perhaps a couple of miles or four and a half miles from the Pier.

Q. And is there a very narrow place in the point?

A. Yes, I think this is one of the narrowest places, as I remember there has quite a sea broken over there a couple of times in the last nineteen or twenty years?

Q. Will you state whether or not these waters above Minnesota Point, or rather the waters from the Lake, set back to the Westward at times?

A. In case of a Northeaster where the waters piled up in the Bay eighteen to twenty-four inches, the water runs west, expands, spreads out, clear out, beyond Spirit Lake, and I would say still further than Spirit Lake. It is true that there is no perceptible raise or drop of the river between Fond du Lac and Minnesota Point. To my knowledge I have seen a good stiff current up stream under such conditions, when a strong Northeaster was on, blowing the water up in our Bay here. Through Big Island there is an artificial canal, I have been through that canal with a small steam boat drawing 22 or 24 inches of water and a good strong current carried me through.

96 Q. You mean through Big Island?

A. Yes, sir.

Q. When you say there is an artificial canal do you mean it was made by an opening that met water on the other side?

A. Yes, there is a little [peni-sula] there, Mr. Washburn, that under the present stage would probably be 25 feet wide, that canal was originally dug out by man, an artificial canal, but the constant swaging of the water back and forth has widened it and given it sufficient depth to run a small launch through.

Q. And you have been through that with a strong current to the Westward?



A. Yes sir. I have also seen further up the river, the water running over the middle ground, filling up the lakes at either side of the river. I have seen water run through the grass, bending in the direction the water was running, showing the water was running up the river [fil-ing] up lakes on the other side.

Q. Would you then, or would you not say then, that from below Fond lu Lac, or at least as far as Spirit Lake there is mingling of the waters of the lake and of the river?

Mr. HARRIS: That is objected to as calling for a conclusion of the witness.

Mr. WASHBURN: I think he is entitled to state it.

Mr. HARRIS: Objected to, incompetent, irrelevant and immaterial.

Mr. WASHBURN:

Q. Whether or not you would say that at least as far up as Spirit Lake there was a mingling of the waters of St. Louis River and of the Lake?

A. There is a mingling of the waters mentioned under certain conditions. Those conditions are when, or during a heavy North-easter when the water of Lake Superior is piled up at this end of the Lake. Of course during the spring there is a mingling of the waters but that is only due to heavy rains. We very often see mingling of the waters due from freshets.

Q. Does the entry known as the Superior Entry, between the Minnesota and Wisconsin Points does that have the appearance of the banks of a river or stream, or does it have the appearance of what may be called an entry?

A. All indications of the original river banks are obliterated.

Q. And is it or is it not rather of the appearance of a connecting inlet of two bodies of water?

A. Well, nothing that I can say—the situation there is nothing to indicate it now.

Q. Nothing to indicate what?

97 A. That there is a true outlet, because the original formation has been entirely obliterated.

Q. When you first saw it?

A. When I first saw it nineteen years ago there was appearance there—

Q. What is the land on either side of that entry?

A. Sand.

Q. Low?

A. Low.

Q. Almost on the level of the water?

A. Well, I should say—

Q. Except where it has been filled up?

A. —I should say there is a level maybe of seven feet.

Q. And extending down to the [water's] edge?

A. Yes, the nature of the soil would assume that position. Sand deposits like that spread out, you don't see well defined banks.

Q. Through that entry would the current flow either way?

A. It does, there is a tide setting back and forth between the out-



lets of this bay. I think that tide would be found to be [—] quite regular intervals. I don't know the length of these intervals, but it is characteristic to waters like that.

Q. When that occurs would it carry the waters of the lake inward?

A. A certain distance, yes.

Q. And whether it affected the rise of the waters inside Minnesota Point to the extent of several inches?

A. I don't believe it would.

Q. Do you know how far up it would be felt?

A. Well, I don't know that, Mr. Washburn. I have never observed to know how much, no I have not.

Q. Let me ask you this question, if, basing this distance on the testimony of other witnesses, if there are what you refer to as tides, periodical risings of waters in the Lake, and if the same would cause a rise in the waters at Minnesota Point, of the Lake, of three or four inches, do you know how far up to the Westward in these waters that rise would be?

A. No, I don't.

Q. And you have never calculated or tested to see to what extent these so called tides—

A. No sir, never have.

Q. Except you have noticed them?

A. That's all.

Cross-examination.

By Mr. HARRIS:

Q. Have you ever made a survey, Mr. Pearson, over the level of the water at Minnesota Point to Fond du Lac to ascertain whether there was any drop or fall?

98 A. No, my information is entirely the information of others that I have read at different times.

Q. You have no personal knowledge?

A. No.

Q. Into what body of water, if any, do the waters inside of Minnesota Point ultimately flow?

A. What waters?

Q. The waters inside of Minnesota Point, the waters between Minnesota Point and Fond du Lac, say into what body of water do these waters ultimately flow?

A. Gulf of St. Lawrence.

Q. Through Lake Superior?

A. Yes.

Q. You say the banks of the St. Louis are not well defined below Fond du Lac?

A. Well, no they are not.

Q. Are the banks at least of both sides well defined clear down to New Duluth and below New Duluth, is not the channel, take it from New Duluth clear down to the bridge that is being constructed by the Steel Plant or below there, is it not all confined within a few hundred feet?



A. Yes—at times that is [oiberliterated].

Q. The banks on Wisconsin side, below where the present boat club is, is that well defined there, high steep banks?

A. I don't call that the river, call that the bay.

Q. Call that the bay?

A. Yes, arm of Lake Superior.

Q. You speak about—are you a Geologist?

A. I don't consider myself so. I have been out on Geological work, but would not classify myself.

Q. Would you pretend to say what the age of these banks are, what they are; could you give a scientific opinion of the age of any of this country around here, that is your own opinion?

A. No, certainly I could not. I refer to the geologists as fixing the age of these beaches.

Q. Now, you spoke about some streams running into these bays?

A. I have not mentioned them all.

Q. Those are comparatively small streams?

A. Yes, creeks, I have paddled them.

Q. In dry seasons are they such streams that there is a constant flow of water?

A. I never saw them dry.

Q. But comparatively shallow?

A. Yes.

Q. Only, some of them, two or three or four miles long?

A. Well, I think that would be the limit.

99 Q. Do these streams supply a quantity of the water that is in these bays; take Pokegama Bay and Kimball Bay, Spirit Lake, are they fed by these small streams?

A. I should not say so.

Q. What source does the water in Pokegama Bay and Upper St. Louis Bay come from?

A. It comes from St. Louis Bay.

Q. From St. Louis Bay?

A. Yes.

Q. [Don'ts] any of it come from St. Louis River?

A. Well, I don't look upon that part of the river, or that part of St. Louis Basin as the river.

Q. Well, the river comes from up in that direction?

A. Yes.

Q. Does any of it get into Pokegama Bay or Spirit Lake, or is the water in the river all confined and remains within its channel until it gets into Lake Superior?

A. The waters that come down St. Louis River spread out.

Q. And largely go to form these bays?

A. Yes, certainly it spreads out under different conditions.

Q. Now, you say on a couple of occasions in the last two years the sea broke over Minnesota Point, broke through Minnesota Point, at one place, was that a permanent break of simply a place where the water ran through during a tremendous storm?

A. It was during a storm.

Q. And after the storm the water ceased?



A. No, I think not.

Q. When you say I think not I don't understand? Do you mean the water continued to flow there.

A. No, I [didn't] make that statement. When the water receded we had dry ground there again.

Q. You say, Mr. Pearson, that at times and owing to Northeast storms, the water sets back into the bays inside of Minnesota Point, and at that time do you mean to say that the current in these waters inside of Minnesota Point, that the natural current is reversed and runs westward and Northward?

A. I do.

Q. What is the nature, under ordinary conditions which way is the current flowing inside of Minnesota Point?

A. East toward Lake Superior.

Q. But under these unusual conditions you think the entire current of these bodies of water set back?

A. Naturally.

Q. Does that always occur when there is a strong Northeast storm?

A. Yes, I think the water always piles up during a Northeast.

100 Q. Have you ever experimented or was it simply from your observation that you assumed the current was running up stream?

A. No, I have not experimented.

Q. Mr. Pearson, did you ever stand on the Duluth Canal when a strong Northeast wind was blowing and when the water was running almost level with the piers and see objects floating out in to the Lake?

A. Yes, I have.

Q. That shows the current naturally from the inside is very strong outwardly?

A. Yes, under certain conditions, even when there is a heavy sea piling in there, there is an under tow, but under other conditions there is a solid body of water.

Q. Well, how would the undertow affect these solid objects floating on the surface?

A. That would occur all right under certain conditions. You would not find those surface particles floating out.

Q. You say the natural appearance of the entry can't be observed at the present time?

A. Not the natural appearance of the banks of the river.

Q. Of the banks?

A. No, your banks are occupied by concrete piers.

Q. And that condition existed since you were in Duluth?

A. With the piers, yes.

Q. You say—you contend there is a tide in Lake Superior?

A. There is.

Q. How do you know?

A. From observation of the United States Government.



Q. Well, what particular, who in the United States Government?

A. United States Hydrographic Department.

Q. You don't know of your own knowledge?

A. No.

Q. You have read somewhere that some United States Officers contended there was a tide in Lake Superior?

A. I have noticed that——

Q. You think when Mr. Darling stated there were no tides in Lake Superior, he was mistaken?

A. You can establish that knowledge by standing on the Point for twenty-four hours. There is a current in Lake Superior.

Q. A regular fixed current?

A. Yes.

Q. The same as you have in a river?

A. Same as in the ocean.

Q. Located at a particular point?

A. Let me tell you there is not a body of water in the world but what that body is in motion.

Q. Does that establish a current?

101 A. That established a current in that lake. The tide oscillates through the piers.

Q. That this great body of water out here, owing to its length, and depth and breadth and the strong winds, get it in great commotion, the water is displaced or creates temporary eddies and currents?

A. No, I don't.

Q. A current in a river, Mr. Pearson flows permanently, does it not, and in the same place, and in a well defined channel?

A. Not always, no.

Q. Well, generally speaking?

A. The St. Louis River.

Q. Generally speaking?

A. Generally speaking where a river has well defined banks you always find the river there.

Q. And at a particular place in that river you can find the current?

A. Yes.

Q. Current of the channel is not over the whole river?

A. No.

Q. And all of the body within the banks is not moved with the same velocity?

A. No, it is not, the greatest velocity is in the center.

Q. Now, do I understand you to say that in Lake Superior you have currents that are well defined and in a permanent place, the same as in rivers?

A. I do, I claim there is not a body of water in the world but what that water is moved in the direction reverse to the clock.

Q. Where is the current or currents in Lake Superior?

A. Well, to answer that question, you throw a bottle in Lake



Superior anywhere along the North Shore, it will finally reach the South shore around the head of the Lake.

Q. Have you experimented?

A. No, I have not, I read what the Government says.

Q. So you think, is that current that you speak of always in the same place, like the gulf stream in the Atlantic?

A. Identical.

Q. Are there—is there more than one current in Lake Superior?

A. No, it is a constant moving of the water.

Q. What width is this current, what extent of the entire body of Lake Superior is occupied?

A. I could not tell you that.

Q. There is a broad expansion of water that is practically [level] at both ends, that is the level here, I take it is level at St. Mary's, it is 100 miles wide and 400 miles long and from somewhere about 600 to 800 or 1,000 feet in depth?

A. Yes.

Q. This current as I understand you is a certain portion in the entire body of water moving, but a certain portion of this  
102 100 miles where the flow of water is different from the flow of water on either side?

A. That represents Lake Superior?

[A.] Yes.

[Q.] You have a current on the North shore, that current runs westward on the North shore.

Q. Now, I want to know what is the expanse of Lake Superior occupied by that current?

A. I have not taken observation in regard to that.

Q. What causes that portion of the lake that is covered by this current or fall, what causes that current?

A. Well, I can explain to you as explained by the best scientists we have in the country. At the North pole is a wabbling motion forming an [e-lipse] with a major axis of 28 feet and a minor axis of 14 feet. That wabbling motion—I make an illustration if I can. You take a basin of water and shake it in the form of an [e-lipse] you will find that water starts a motion, that holds good for every body of water on the face of the earth and the scientists claim that it gets its motion from that wabbling motion at the North pole [froming] that [e-lipse].

Q. You say that if you take a basin of water and you shake it the water will get in motion?

A. If you get that particular motion.

Q. Well, you give it a particular motion and then you stop shaking it and the motion that has been started on these waters will [creat-] certain currents and eddies?

A. I would not call that an eddy. It will throw that water into motion.

Q. After a while that current in that basin of water will cease?

A. Never—

Q. That will be continuous?



A. —Not at the North Pole.

Q. You are speaking now, if we take a basin of water and put it on this table and give it the motion you have indicated there for a certain length of time it will put that water in motion, and then if you cease that motion there will be currents?

A. No if you cease that——

Q. Finally it will reach an equilibrium?

A. Yes.

Q. Now, is there any difference in Lake Superior, you take it in the time of a storm and the great portion of that body of water gets into motion and [temporarily] there are currents created, but after the storm has ceased, say after twenty-four hours the surface [become-] as smooth as glass, are the currents still running in Lake Superior?

A. They are. A severe storm on Lake Superior would make no difference as to the motion of the body of water, it would affect the surface, but Lake Superior is 1,000 feet deep and 600  
103 feet deep up to two or three miles on the North shore, so in my estimation no storm would [effect] that motion due to oscillation, which is a cause for that water movement in all bodies of water on the face of the earth.

Q. Mr. Pearson, you have seen Lake Superior, I suppose at times when it was perfectly quiet?

A. I have paddled on it for fourteen hours still as a mill pond.

Q. When there was [-solutely] no wind perceptible?

A. Of course, Lake Superior is never as still as a mill pond.

Q. I want to ask you if in such a period as that you could go out in certain places in this lake and deposit a float, if it would go off in some well defined direction?

A. It would.

Q. You have never experimented?

A. I never have, but have been reading this for the past twenty-five years.

Q. Have you experimented yourself as to just where these currents are located in Lake Superior?

A. Perhaps it might not be proper to call it a current, it is a movement of water, it is a motion, you may term it a current if you wish.

Q. Do you know whether it is a mere surface——

A. The whole body of water extends to a depth, when your surface is disturbed by severe storms then your surface movement would be in the direction of the wind, but that would not——

Q. I understand you, there are other places where you could place a float and it would remain there?

A. I don't know definitely in regard to that. There might be some place in Lake Superior where the water would not be in action.

Q. Where does the water of [L-ke] Superior flow?

A. Gulf of St. Lawrence when I studied geography.



## Redirect examination.

By Mr. WASHBURN:

Q. Mr. Pearson, under normal conditions, probably such as exist today, is there any very perceptible current from Spirit Lake say, down to Minnesota Point?

A. Under conditions today, such as there is today, I would not say there is any perceptible current in St. Louis River, St. Louis Bay and Spirit Lake, you might extend that maybe a little further up. There is practically—I say today, I mean normal conditions.

Q. You mean normal conditions from the action of the water falling in or out?

104 A. Be very little.

Q. Now, you say when you answer counsel in respect to the river and well defined bank of the river, he asked you if the current was to be found throughout the entire river bed or in the center only; nevertheless, the stronger current may be in the center, now is it not true that the entire water is flowing?

A. Yes the entire water is flowing.

Q. But not so swiftly?

A. Not so swiftly.

Q. You speak of the banks not being well defined banks below some point, we will say Spirit Lake, you do not mean that there are not well defined shores to this basin that you speak of?

A. Certainly.

Q. You didn't testify did you, that if one took a basin of water and set in motion [e-]lptical, that it would keep on if you quit?

A. No.

Q. And its effect on the earth?

A. That motion keeps on as long as the earth has that oscillation at the North Pole, that looks reasonable.

Mr. RICHARDS:

Q. Have you ever, do you know [it] there is any channel in the ground at the Lake bed of Lake Superior?

A. No, our charts don't show that.

Q. Do you know of any channel in the ground forming the bed of this basin westerly of Minnesota Point?

A. I have been familiar, in fact I have traced the old channel of the water flowing through this basin right to Lake Superior.

Q. I will call your attention to a plat here, now do you see anything calling your attention to plaintiff's Exhibit 6 that indicates the location of that defined channel.

A. I don't as you would on this, but the Government chart will show the original channel, it will show you—there is a tow head there of 20 feet. The old charts will show the river bed.

Q. Coming out here at the entries, that is the natural entry between Minnesota and Wisconsin Points?

A. I think it will also show where the flow from the Nemaji River goes into the old river beds,



## Recross-examination.

By Mr. HARRIS:

Q. Did I understand you to say, Mr. Pearson, that in ordinary conditions there is practically no current in the river from Fond du Lac down to Minnesota Point?

A. No, from Spirit Lake down.

105 Q. There is a constant current above there, water constantly coming down?

A. Yes, there is always water coming down.

Q. What [*becames*] of that water?

A. We made a statement here a few minutes ago that that water all mingled with the lagoons and spread out.

Q. The current may become less—

A. I don't think there is any current, I mean it would not be perceptible,—but a motion.

Q. Of course you don't mean it is dead water?

A. No.

Q. How about the Mississippi, has that well defined banks? Is there a place from St. Paul to New Orleans—are the banks well defined—are there no places where it spreads out?

A. No, you don't get it spread out. Your banks are forty five or fifty feet high. Your banks at—

Q. Is there ~~not~~ lots of places on the lower Mississippi where the river is two or three miles wide and at various places three fourths of a mile wide?

A. Well, no, there is not.

Q. How wide was the natural entry from the waters inside of Minnesota Point into Lake Superior, about?

A. Well, I can't tell you, I have a cut of that.

Q. Formerly how wide was that natural entry?

A. Might be 150 feet wide.

Q. Well, it was not over a few hundred feet?

A. Yes.

Q. And that was the only natural outlet from these waters inside Minnesota Point to Lake Superior, was it not?

A. Yes.

Q. What was the depth, if you know, comparative depth of waters inside of Minnesota Point before any artificial dredging?

A. Nine feet.

Q. What is the depth of the waters in Lake Superior outside of the entry, say half a mile?

A. Well, out a mile you have got sixty feet, out half a mile would be forty feet.

Q. Tides of the ocean, have you ever studied them?

A. I have.

Q. For rise and fall?

A. Yes.

Q. How far up the Hudson do they run?

A. I have seen a tide that extends to Kingston, 110 miles North of New York.

Q. When the tide is coming in does that set up the river?



A. Yes.

Q. It is still the Hudson River, is it not?

A. Yes sir.

106 WILLIAM E. RICHARDSON, being duly sworn testifies as follows:

Direct examination.

By Mr. WASHBURN:

Q. Your name is William E. Richardson?

A. Yes sir.

Q. And you live in Duluth?

A. Yes sir.

Q. For how long have you lived in Duluth?

A. For about twenty-five years.

Q. You are a member of the Bar of Duluth?

A. Yes sir.

Q. What line of work and business, however, have you been engaged in more particularly in the last 20 or 25 years?

A. In the care and handling of real estate.

Q. You are the agent of the plaintiff in this action?

A. Yes sir.

Q. In charge of the property here in question?

A. Yes sir.

Q. By the property here in question, I mean the lands of the plaintiff described in the complaint.

A. Yes sir.

Q. Are you familiar with the location of these lands and their character?

A. I am.

Q. Are you familiar with the location of this little island that has been described here as between Big Island, so called, [an-] the Minnesota shore?

A. I am.

Q. And have you been more or less familiar with it and its location for some years past?

A. I have.

Q. Including prior to the construction of the improved channel through these waters?

A. I have.

Q. When did you last visit the island?

A. Last week.

Q. Did you examine the island, or what there is of it here with respect to the filling around or about it, made by the government in the depositing of dredging materials from the construction of the improved channel?

A. Yes sir.

Q. You heard the testimony of Mr. Taylor and Mr. Darling given in this proceeding?

A. I heard part of the testimony of Mr. Darling and I think all of the testimony of Mr. Taylor.

Q. Showing you for the purpose of reference in your evidence



Plaintiff's Exhibit 8 and 9, do you recall the testimony of Mr. Taylor to the effect that in the construction of the improved deep water way they had cut away the main body of the island leaving this prong that extended to the North or northeastward remaining, and leaving a small portion on the southerly side which has since disappeared,—do you recall that?

A. Yes sir.

Q. Now, having that in mind and having your visit to the island in mind and this chart Exhibit 9 before you, state whether  
107 the deposit of the dredging material has had the effect to form a continuous reef of land between the Minnesota shore and the improved channel much as represented or substantially represented on Exhibit 9?

A. Yes sir.

Q. State whether you were able by being upon this land, to discover some portion at least of the original island?

A. I was.

Q. State what character of growth there is upon that.

A. Willows, about eight to ten feet high in some places, and some short brushes, I think alder.

Q. State whether there is any growth now standing upon that portion which has been filled in by the government?

A. There is.

Q. What is on that?

A. The same—willows and small bushes of some sort.

Q. To what height?

A. I think about seven or eight feet,—as near as I could judge.

Q. By the appearance of Chart Exhibit 9, the easterly end of this reef, which embraces the portion of the island left, appears to be wider?

A. It is really, in my judgment, wider than it appears there.

Q. Has there apparently been filling done on both sides of that easterly end of the original island?

A. Yes sir.

Q. And at the place where it is indicated on the map, Exhibit 9, as the place where the original deep water channel existed, [ha-] that been filled up entirely?

A. Not entirely, only about half I think.

Q. I mean at the westerly end.

A. At the westerly end, yes sir.

Q. At the westerly end filled up entirely?

A. Yes sir, there is where I spoke of the growth of willows.

Q. There is a growth on that too is there?

A. Yes sir.

Q. And the rest of it you think is not more than half filled?

A. No sir.

Q. State whether or not this island and this reef of land intervenes between the lands of the plaintiff and the deep water channel.

A. Yes sir, it does.

Q. I mean by that, as you doubtless understood, the deep water improved the channel.



A. The navigated and [navigible] channel as it exists now, and the main shore land.

Q. Whether so intervening, Mr. Richardson, it will, if occupied by others, or the claim of occupancy maintained by others than the plaintiff, or those claiming under him, operate to prevent the plaintiff, or others holding under him in interest, as the owners  
108 of the shore lands, from having access in front of his premises to the navigable and navigated channel.

A. It will.

Q. State whether in your opinion this island, or what is left of it, if it can be traced, is usable for any valuable purpose other than in connection with the shore?

By Mr. HARRIS: That is objected to as calling for a conclusion of the witness.

A. I don't know. I don't see how it could be used for any purpose except the purpose that it is used for now, that is, for a landing place for fishermen or for picnic parties, or something of that nature.

Q. For any commercial and valuable purpose commercially could it be used to advantage other than in connection with the shore?

A. Not that I know of.

Q. State whether the right to access to and connection with the navigable and navigated channel in these waters is or is not a substantial part of the value of the plaintiff's lands.

By Mr. HARRIS: Objected to as calling for conclusion of the witness.

A. The value of the land of the plaintiff is for commercial and manufacturing purposes. It is of more value for that [purpos-] than for any other and access to the navigated and navigable channel by means of wharves or docks which would extend out from the shore land to the navigable and navigated channel in the ordinary way that docks are put in, constitutes the chief value of the shore land.

Q. I mean to ask you a little with respect to the substances found in addition to the matter of growth on this reef of land, and even over on what was clearly a part of the original island remaining.

A. There are found on this old prong of the original island large logs which are [embed-ed] in the sand to almost their full size, others that are about half exposed; logs I should say three, yes over three feet in diameter. There is quite a large number of these logs with their roots; apparently have been floated down and landed on this prong of the island and have been covered up later with sand. There is a large number of these on there and they also appear to some extent on the latter accretions there to the land where it has been filled in making the channel.

Q. Did you discover on this island where there had apparently been a house or some structure at a previous time?

A. Yes sir.

109 Q. What evidences were there of that?

A. Well, there were the partly burned posts and a lot of melted bottles and debris generally from a burned house.

Q. Were there posts sticking in the ground?



A. Yes sir.

Q. Partially burned off?

A. Yes sir.

By consent of counsel witness was withdrawn from the stand and Mr. W. B. Patton was sworn.

W. B. PATTON, being first duly sworn testifies as follows:

Direct examination.

By Mr. WASHBURN:

Q. [You-] name is William B. Patton?

A. Yes sir.

Q. Where do you reside?

A. Duluth, Minnesota.

Q. How long have you lived here?

A. Twenty-nine years.

Q. What has been and what is your business or profession?

A. Civil engineer.

Q. And you have practiced that profession ever since you have been here?

A. Yes sir, continuously.

Q. During a considerable portion of the time have you been City Surveyor, or engineer of the city of Duluth?

A. Yes sir.

Q. And at other times of the county?

A. Yes sir.

Q. And at times have you been a member of the Plat Commission?

A. Yes sir.

Q. Are you familiar with the territory here and here about, including the waters of Lake Superior and the head of Lake Superior, say up as far as Fond du Lac?

A. Yes sir, very familiar with them.

Q. And the lands about and bordering upon the waters?

A. Yes sir.

Q. State whether the shore of the waters from in the vicinity of Fond du Lac down to Minnesota Point is a regular or an irregular and indented shore.

A. It is a very much indented shore. Very irregular in outline.

Q. The waters extending in places far up into the land?

A. Yes particularly on the Wisconsin side the waters extend quite a distance back.

Q. And is the shore broken here and there by little streams?

A. Yes sir.

Q. The thing that I want to ask you, Mr. Patton, is whether these shores that you mention resemble in character and formation the banks of a stream or whether they resemble in character and formation the shores of Lake Superior.

110 By Mr. HARRIS: Objected to as calling for conclusion of the witness.

By Mr. RICHARDS: Objected to as immaterial.



A. My opinion, based upon my studies of water and shapes, &c.—I should say that it very much more resembles the ordinary lake shore or lake contour than a river.

Q. And with reference to height, what have you to say of this shore up here?

A. The shores vary from 20 feet or so around West Superior to about 30 feet at West Duluth and about 60 feet at New Duluth and in that neighborhood,—height above the level of the water.

Q. And in the main, which side, if either, is more rocky than the other?

A. Well, immediately adjacent to the bay, the Minnesota side is the more rocky. Of course if you go back far enough on the other side you find the same rock.

Q. So that this irregular shore that you have spoken of above Minnesota Point, on the two sides, ranges in height above the water from 20 to 60 feet?

A. Immediately adjacent to the water; higher as you go back.

Q. I meant immediately adjacent to the water.

A. Yes, sir.

Q. The shores, then are extremely irregular, but very high above the water?

A. Yes sir.

By Mr. WASHBURN: That is all.

No Cross-examination.

WILLIAM E. RICHARDSON, recalled and cross-examined by Mr. J. B. Richards, counsel for defendant Tallas.

By Mr. RICHARDS:

Q. You say you were at this island, we will call it the Tallas island for definiteness,—this island you have spoken of as having a prong,—you were there a week ago?

A. I was there one day last week.

Q. Were you there for the purpose of making any measurements, Mr. Richardson?

A. I was there for the purpose of making a general examination of the situation.

Q. Did you make any measurements?

A. I did make some.

111 Q. Of the acreage of that body of land?

A. I did a little bit of pacing.

Q. Nothing except pacing?

A. No other way.

Q. Did you go up on this, what you call a reef of sand, to the point where it touches the improved channel made by the government?

A. I did not go to the edge of the water; I went close to it.

Q. How far down upon the old channel of the river,—the St. Louis River,—did you travel on this reef below the boundary [off] the improved channel as made by the government,—moving toward the City of Duluth or easterly?

A. I don't know; I didn't pace.



Q. Did I understand you to say that all of that reef, from the point where it touches upon the present navigated channel improved by the government, lies immediately opposite the lands of the plaintiff as specified in the complaint?

A. No, I didn't say so and it does not. That is not exactly correct. It does lie opposite the lands of the plaintiff. I had in mind another point when I answered.

Q. Does all that reef you have spoken of as a reef of sand lie directly opposite the lands of the plaintiff as described in the complaint?

A. The present reef or this original prong?

Q. I was speaking of the deposited soil, the present reef.

A. I do not understand your question and desire to know more as to the limits of the deposited land which——

By Mr. WASHBURN: He wants to know if the whole reef as shown there lies between the plaintiff's land and the main channel. In other words, do the plaintiff's lands extend along the entire reef. You understand his meaning, answer in your own way.

A. The reef as it now stands, I think extends further than the lines of what would be the riparian rights of the plaintiff.

Q. Can you indicate on this chart, which is Plaintiff's Exhibit 9, with reasonable accuracy the approximate point indicating the westerly line of the plaintiff's lands as specified in the complaint, on the Minnesota shore.

Witness examines Plaintiff's Exhibit 9.

A. I don't think I can from this chart. I could not give the exact points on this chart because the shore land at the easterly side of the plaintiff's property is platted property and the entire shore land is not owned by the plaintiff.

Q. You may indicate by a red mark the westerly limit of the plaintiff's lands on the shore line.

112 A. There is a part of the shore line at about this point here (indicating and marking with an x in red) as I recall it, a block of ground not owned by the plaintiff. The easterly line is about at the extremity of the point projected out where I have made a letter E in red.

Q. And you might make a letter W here, Mr. Richardson marking the westerly boundary.

(Witness marks a W in red on the plat.)

Q. Mr. Richardson, I call your attention to the part on Plaintiff's Exhibit 9, which lies northerly of this sand reef, and on which there are figures indicating the depth of a former channel, I will ask you is that part of the old original channel existing lying northerly of this island that is claimed by Tallas?

A. It is a part of the original channel. If reference has been made to the figures I would say that the figures as given there are not correct. I have ascertained that these figures of the soundings were obtained from soundings made in 1896.

Q. Well, referring now to that part of this chart upon which



those figures appear, this chart Plaintiff's Exhibit 9,—that is still open water?

A. Yes sir,—that is, I don't know that it is all open water. In fact I am satisfied that the lines of the reef have been extended so that it is not as much open as it appears there.

Q. But to what extent,—you have taken no measurements?

A. I have taken no measurements to know.

Q. Do you know what the depth of the water now is at the point indicated on this chart by the figures 23?

A. At that particular point I do not know. I know generally that it has been filled in and is shallower each year than it was the year before and I understand it is now about one half the depth it was at the time these soundings were taken.

Q. Have you ever made any measurements of what you call the old prong?

A. I have made no measurements; I have estimated it.

By Mr. WASHBURN:

Q. I did mean to ask you at what distance from the present, I will not say house, I will not say shack, I will say cabin, did you find these evidences of a former domicile of some sort?

A. About 45 paces.

Q. The soundings that are shown on the Chart Exhibit 9, have you ascertained from the engineer's office when they were made?

A. Yes sir.

Q. Were they made before or after the government improvement?

113 A. Before. They were made in September 1896.

By Mr. RICHARDS:

Q. Mr. Richardson, do you say that the plaintiff is cut off from access to the navigable waters in the vicinity of his land by any change, artificial or natural, that has occurred within the past ten years?

A. Yes the plaintiff is now shut off from the navigated and navigable channel in the ordinary use of his riparian rights.

Q. You mean by going westerly it runs into that sand reef that you speak of?

A. I mean by extending wharves or docks out from the shore it would be impossible for the plaintiff to enjoy his riparian rights to the navigated and navigable channel, without going across this prong of this island.

Q. You seem to make a difference between navigated and navigable channel do you not?

A. I mean by navigated and navigable channel the improved government channel.

Q. In the use of both these words, navigated and navigable you mean that new improved channel made by the government from 1899 to 1905.

A. I do for the reason that the word navigable is so indefinite



that anything that will float along is frequently called [v] navigable.

Q. Did you hear Mr. Taylor's testimony that it was still practicable for boats to go in behind, that is north of this island called in the complaint low, wet, marshy ground, claimed by Tallas?

A. I heard him say that a boat could go in, I don't know what size boat could.

Q. You don't mean then by your testimony, to state that the plaintiff's lands on the Minnesota shore, lying northerly of this sand reef, cannot be reached from the navigable waters in the immediate vicinity, and cannot be reached from the present navigated channel as improved by the government?

A. I mean that the ordinary boats which ply on the lakes and which come into the harbors on Lake Superior, could not get access to this property.

Q. That is because no dredging has been done up to the plaintiff's land to accommodate the modern deep draft vessel?

A. Why, I mean that this land intervenes between the shore land of the plaintiff and the channel as improved by the government.

114 Q. But do you not mean that the plaintiff has not access by water to the easterly into the present navigated channel?

A. I think by going across the riparian rights of adjoining owners that with a small boat there is a part of the land of the plaintiff that can be reached, but not by any of the ordinary freight boats or passenger boats which ply in this locality.

Q. Let me call your attention to this chart Plaintiff's Exhibit 9 again Mr. Richardson, and to that indication upon this chart lying northerly of this sand reef that you have spoken of and opposite the plaintiff's land described in the complaint, now I ask you, using the riparian rights which would naturally belong to the plaintiff's land, is there anything to prevent access to these waters indicated by the figures 12, 23, 31, 25, 20, 15 and 23.

A. You mean any natural obstacle?

Q. Anything,—any reason why you cannot get access.

A. There is one reason why you could not get access in the way of improvement and that would be on account of the ownership of a part of the shore lying between portions of the plaintiff's property.

Q. That is this little block of land you spoke of a while ago. That block of land separates part of plaintiff's land from other parts and has riparian rights of its own?

A. Yes sir.

Q. You do not understand that the riparian right would go beyond the state boundary line of the boundary of lands in Minnesota?

A. Yes sir. I understand it would go to the navigated and navigable channel.

Q. And if it did not go beyond the center of the main channel, or the thread of the stream, why, could you figure out any obstruction to the right of access from the plaintiff's lands lying westerly of this block of land, along the main channel, over the territory



indicated by these figures 12, 23, 31, 25, 20, 15 and 23 into the present navigated channel?

By Mr. WASHBURN: I want counsel to define what he means by the use of the term "Main channel," whether he means from the shore of Big Island to the Minnesota shore or whether he uses the deep water indications as the main channel.

By Mr. RICHARDS: I am speaking of the deep water indications Mr. Washburn.

By Mr. WASHBURN: The original deep water indications?

By Mr. RICHARD: Yes sir. That was referred to as indicated on Plaintiff's Exhibit 7 and was called by Mr. Darling the  
115 main channel of the St. Louis River. These figures indicate the original channel.

A. I think that although the boundaries of riparian rights are in an unsettled condition in this state, that the probable boundaries of the riparian rights of the plaintiff to a part of the land described in the complaint, would have access to what is known as the old channel.

Q. And if that access would give the right of going along easterly in the waters indicated in the old deep water channel, and as far easterly as the present improved navigated channel as made by the government, this would serve the plaintiff's land would it not?

A. It would not be a full enjoyment of the riparian rights. It might be a modified, an unusual enjoyment.

Q. But on that assumption, you have full access to the present navigated channel?

A. On that assumption there would be an unusual—there could be an unusual access to the plaintiff's land, if your assumption is correct, but not the ordinary and usual riparian rights which [ar] are to extend out from the shore land to the navigated and navigable channel.

Q. Well, is this solely because that little block of land takes in part of the riparian rights which would otherwise belong to the plaintiff if he owned that block.

A. Largely so, yes sir. The value of riparian rights is largely in the right to wharf out in a direct line to the navigated and navigable channel from the shore.

Q. If somebody owns—if you own on both sides of a stranger, of course you are subject to the inconvenience of that fact in the wharfing privilege in reaching from one side of your lands to the other.

A. The question of the boundaries of riparian rights has been before the courts here for the last two or three years in a case involving riparian rights east of Grassy Point and while the case has not yet been heard by the Supreme Court I must say that the decision of the trial court was a great surprise to me and was not the kind of a decision I expected. I am in hopes that the Supreme Court will adopt my ideas of the boundaries of riparian rights. I think they ought to.

By the REFEREE: What case was that?

A. It is the case of Luther Mendendall vs. George L. Raymond.



Redirect examination.

By Mr. WASHBURN:

Q. Questions of counsel, Mr. Richardson, have brought one or two matters to my mind. This original deep water portion  
116 of this channel lying between Big Island and the plaintiff's land on the Minnesota shore, as I understand you, is entirely closed and filled up at the westerly boundary of the prong as left by the government?

A. It is.

Q. And that there is some filling over on the northerly side and easterly of the prong?

A. It was filled in by dredges, quite a large amount clear down,—practically down to the old cabin of one of the defendants Tallas.

Q. Perfectly apparent on the ground is it not?

A. Yes, as I testified before the willow trees on the site of where the old channel was are now probably seven or eight feet high.

Q. Almost as high as the others?

A. Yes sir.

Q. And the waters lying northeasterly, as I understand you, are continually growing shallower?

A. Yes sir.

Q. And so far as such access, as you appear to have answered to counsel, could be had there in any form, would it not be by small boats?

A. Yes is.

Q. Not a commercial enjoyment of the access that you have been speaking about.

A. That is what I intended.

Q. That is what you meant when you answered counsel "a modified enjoyment"?

A. Yes sir.

Recross-examination.

By Mr. RICHARDS:

Q. That is, by commercial use, you mean by modern draft vessels that could navigate the navigated channel as improved?

A. Certainly. I mean freight boats that ply on the lakes and come into our harbor, and I also had in mind when I said "modified" that the usual right and accepted riparian right involves the right to wharf out in a straight line with the shore, directly out from the shore, which of course is of much more benefit than any angular or oblique channel.

Q. And the interference which you speak of to access to the navigated channel is by this intervening block of land which lies between the plaintiff's land on the Minnesota shore?

A. That would be one of the questions, but the fact of the water being shallow and always will continue to become shallower as sand is deposited from time to time would also be a modification of riparian rights.



Q. There is nothing to prevent the plaintiff from dredging out the old deep water channel and getting access to his lands is there?

By Mr. WASHBURN: Objected to as involving a question of controversy with the United States, which this witness cannot settle.

117 A. I am not enough familiar with the rules of the government and the action of the government engineers to answer your question, but it occurs to me from the plats which I have looked at, that the dock line on the north shore and opposite this land of the plaintiff is a closed line indicating that the government engineers, and I believe they have so testified that in their judgment a proper use of the water required that this line be closed, while on the south shore, the Wisconsin shore, in numerous places they have opened the outlets and bays by breaking the shore line, which is not the case here.

Q. That is a limitation to extending your right to wharf out, but that does not prevent your wharfing out the old deep water original channel does it?

A. I said before that I was not familiar with the governmental regulations and it occurs to me that according to the testimony of the engineers they had considered it necessary to close the old channel for governmental reasons and the reasons which caused them to close the channel would probably prevail to the extent of keeping it closed, so that whatever current there is up and down these waters of the bay would increase and keep the present navigated and navigable channel clear. I do not know, of course as to this but I conceive there would be a reason why the government would not allow anything to be done in the way of dredging inside of the closed dock line which would militate against keeping their navigated channel clear.

Q. You do not understand that any witness has testified that they did not desire that old deep water channel lying north easterly of this prong of land to be opened or that would prevent its being dredged out or used?

A. Only the fact that the government deposited the sand there which was taken out of their present navigated channel.

Q. At the north end where it intersected—at the west end—

A. No, at the north and west side away down to the old cabin of the defendant Tallas and there were also deposits on the easterly side because that shore line has been greatly extended and the line between the two islands shown farther east is practically closed up at the present time and I believe there is a foot bridge across it.

Q. But this point that you speak of where it has been closed and where the foot bridge is, is quite considerably northerly of the old deep water channel?

A. Yes, sir, but the old deep water channel even at the east end has been greatly narrowed and shallowed.

By Mr. RICHARDS: I think that is all.

118 By Mr. WASHBURN:

Q. Can or can not the same use be made of the original deep  
14—339



water portion of this channel as could be had prior to the improvements made by the government?

A. Certainly not. One of the most important points regarding the value of wharves is the use of access to the modern ship and all wharves or docks are more valuable or less valuable as they allow freedom of movement in all directions, either up or down, as we may speak, and it is for that reason that riparian rights which extend out directly to the line of navigated and navigable water are of a great deal more value than those which are curtailed in any way.

Q. State whether the new and improved deep water channel as made by the government through these waters all along the locus in quo, is practically midway between the shores of Big Island and the Minnesota shore?

A. It is almost in the center between the shore line of Big Island and the Minnesota shore.

Q. Probably does embrace the center line at some point all the way through?

A. I think there is no question about it.

Cross-examination by Mr. HARRIS, Counsel for Defendant Whiteside.

By Mr. HARRIS:

Q. When were you first acquainted with this part of the territory around this small island and Big Island Mr. Richardson? How long have you been acquainted with the condition of [affaires] up there and with the waters in that vicinity.

A. Why, more or less, Mr. Harris, since I first came here, but especially twenty-one years ago last Good Friday when I was on an excursion steamer making a trip up to Fond du Lac with both of my arms in a sling, with a large crowd on the boat and we stayed there all night. I have had a distinct recollection of that island ever since. I wish to make a correction. My arms were injured on Good Friday and were recovered sufficiently to be in a sling later on when navigation opened and I took this trip.

Q. Did you ever make any—before this dredging that was done by the government on what is now known as the improved channel, did you ever make any careful examination as to where the old original main channel ran, Mr. Richardson?

A. No, sir, I have made no soundings of it.

Q. Then how do you know that at the present time, if you did not know where the old channel was located, how do you know that the filling at the easterly end of that small sand island has intrenched on the old main channel?

119 A. Oh, from my general knowledge.

Q. Just from your general knowledge.

A. Of course I have been up there hundred of times, up and down the river and am familiar with the various parts of the river.

Q. When you were up there recently you took no measurements or anything of that kind as to the extent that this filling has been thrown into the old channel?



A. I took no measurements. The general appearance of the shore indicates to my mind, and with my knowledge, of course, of the situation which has extended over these twenty-five years, taken all together gives me the opinion that I now have, I presume somewhat influenced by the investigations which I have made at the office of the United States engineer and by conversations with people who live up there on the shore.

Q. That to a certain extent along the easterly end of that small sand island they have filled in on the southerly side of the old main channel?

A. Yes, sir.

Q. Have you not closed that old main channel up entirely along the easterly end?

A. No, sir. It is closed to the ordinary freight boat but not to small boats.

Q. But that is your opinion based on your knowledge of the old main channel and upon its general appearance at the present time and is not based upon any actual measurements as to the extent that it has been filled in?

A. It is not based on any actual measurements which I have taken. As I have said before, it has undoubtedly been influenced by my examination of the government records and—

Q. You have no other information then except the general appearance up there and information which you have received from others, government engineers and others?

A. I have not, and my own observation.

Q. You have taken no measurements of any kind except pacing the surface?

A. Pacing the surface, yes, sir.

By Mr. HARRIS: I think that is all.

By Mr. WASHBURN: I will now waive, under the stipulation, any objection to your proceeding and you may proceed to take any testimony you wish, but I do not wish to foreclose my right to take other testimony by serving notice of the closing of my evidence, until after we obtain the printed minutes of what we have taken and see if it can be gotten into satisfactory form.

120 By Mr. HARRIS: I will now offer in evidence in behalf of the defendant Whiteside three maps, being a blue print copy and a photographic copy of the map of 1843 from the surveys of J. M. Niccollet, and ask to have the same marked Defendant Whiteside's Exhibits A-1 and A-2; also printed or [lit-ographed] copy of the map or chart made under the order of Capt. George G. Mead, in 1861 and reduced for engraving under the direction of Col. J. D. Graham in 1863 and ask to have the same marked Defendants Whiteside's Exhibit B., both of said maps being referred to in the stipulation now in evidence.

The maps were duly marked as requested and received in evidence.



*(Testimony for Complainant Resumed.)*

The taking of testimony in behalf of the plaintiff was resumed by the consent of all the parties, at the Board Room on the 12th Floor of the Alworth Building, on the 26th day of August, 1910, at 10 o'clock in the forenoon, before the Hon. Henry F. Greene, Examiner, all parties appearing by their respective counsel, as heretofore.

The witness, JOHN H. DARLING, having been recalled, testified as follows:

**Examination.**

By Mr. WASHBURN:

Q. Colonel, in your cross-examination, when you were on the stand before, you answered one of counsel with reference to some evidences of ancient river beds in these waters in St. Louis Bay and these other waters, and I think I left the examination in a rather indefinite way. I therefore want to ask you if in that testimony you referred to any river beds or evidences of river beds in recent times?

A. I did not. I referred to prehistoric times. I would call it geological times. Not ancient geological times, but rather recent geological times, but long preceding any historical period with which we are acquainted.

Q. A good many thousand years?

A. A good many thousand years ago. I should presume somewhere between twenty and fifty thousand years.

Q. The other thing that I wished to ask you is whether the soundings of the original deep [w-ter] channel along through or past the locus in quo here, up between Big Island and Minnesota shore,—whether those soundings were as shown on the chart, Exhibit 9, recent soundings, or old soundings?

A. Those are old soundings.

Q. Taken in what year?

121 A. Taken in the fall of 1896.

Q. So that the chart, while made since the government work was done, the soundings are the old soundings taken long prior to the doing of the government work?

A. Yes, sir.

Q. And the map, Exhibit 6, of course was made prior to the government work, and approved before the government work was done in 1899.

A. Yes, sir.

By Mr. RICHARDS:

Q. Mr. Washburn asked you about soundings here at a certain place, and you say that those soundings were made in 1896?

A. Yes, sir.

Q. And you were referring, I think, to Exhibit 9. Now, I would like to ask you to state, if you can Mr. Darling, beginning up here



and referring to the St. Louis River channel opposite Spirit Lake, where it makes a big bend, I will ask you to state if you can when those soundings were made?

A. I am not able to give you the date of those soundings. I am under the impression that they are not very recent. The soundings on this chart were taken at various times, depending upon the importance of them, and their relation to government improvements.

Q. State where the oldest soundings are on that channel?

A. Some of the oldest were at the locality which has been referred to in your question and my answer, between Big Island and Minnesota shore. Those are some of the oldest.

Q. And what are the oldest? About what years?

A. 1896.

Q. You think these were the oldest?

A. There may be some older than that,—No, I think not.

Q. Nowhere on this Exhibit 9? For instance, how about the soundings, the deep soundings here, indicating, I think you have stated, a channel in Superior Bay, between the end of Connor's and Rice's Point, going toward the natural entry into Lake Superior? Between the white part indicated and Minnesota Point, to-wit: what seems to be indicated by dotted lines on the old channel?

A. Those soundings were taken a number of years ago. I am not quite certain as to the year, but I think it was in 1901, and there are some earlier than those taken in the improved channel.

Mr. W. B. PATTON, recalled for further examination, testified as follows:

Examination.

By Mr. WASHBURN:

Q. Mr. Patton, you gave some testimony when on the stand before relative to the upper end of Lake Superior, to the effect  
122 that the body of [w-ter] narrowed toward the westerly end or from the westerly end to the eastward widened until the widest point of the lake was reached. I show you a map marked Plaintiff's Exhibit 11 and ask you to state whether that was prepared by you, and under your immediate direction?

A. It was, yes, sir.

Q. Showing the westerly end of Lake Superior down for a distance as the lake widens to the eastward and narrows to the westward?

A. Yes, sir.

Q. And showing the headwaters of the lake up as far as Fond du Lac?

A. Yes, sir.

Q. This map is drawn to a scale?

A. Yes, sir.

Q. And is a correct representation?

A. Yes, except that the ends of some of these streams are sketched in. The shore line and all that part is correct.

Q. These lines along on each side of the water,—what do they indicate?



A. Streams running into the lake.

Q. What have you to say with reference to this exhibit as relates to islands? Are they shown?

A. No, they are not?

Q. This, then, is a sketch of the shore line without the intervening islands?

A. Yes, sir.

Q. The waters immediately to the northward of where you have marked St. Louis River are, in fact, what waters—what local name?

A. This part here is Spirit Lake.

Q. And immediately easterly of that, St. Louis Bay?

A. Yes, sir.

Q. The point of land extending opposite the words "West Duluth" does that represent Grassy Point?

A. Yes.

Q. And the waters between Grassy Point, or along near to Grassy Point and the waters of Spirit Lake proper, is that what has been called here in the evidence Upper St. Louis Bay, and the waters east of Grassy Point, extending down to Rice's Point, are what have been referred to as St. Louis Bay?

A. Yes, sir.

Q. And the waters between those points (indicating Minnesota Point and Rice's Point) is Superior Bay?

A. Yes.

Q. And what is the opening immediately opposite the mouth of the Nemadji River?

A. It is called the natural entry.

Q. This is the entry between Minnesota and Wisconsin Points?

A. Yes, between Minnesota and Wisconsin Points.

Q. I now show you map marked "Plaintiff's Exhibit 12" and ask you to state whether that is the same map with the islands sketched in?

A. Yes, sir, a tracing of the same map with the islands shown.

123 Q. These maps were made by you at my request, were they not?

A. Yes.

Q. The one for the purpose of showing the contour of the shore without the islands and the other showing the appearance with the islands sketched in?

A. Yes, sir.

Q. And they are both correct representations?

A. Yes, sir.

Q. These lands where these water courses course down, as shown all along down either side, are all more or less high? are they not?

A. Yes.

Exhibits 11 and 12 offered in evidence for the purpose of making more clear the testimony of the witness and making a more clear representation of the [waters] and the lands in question.

By the EXAMINER: Any objections?



By Mr. WASHBURN:

Q. Pending the offer of these maps in evidence, I will ask you, Mr. Patton, if including the islands sketched into Exhibit 12, you included and have sketched in these lands or the lands along near to the Minnesota shore in the vicinity of West Duluth and Ironton made by the government in the improvement of the channel?

A. Yes, those islands are all sketched in and traced from Coast chart No. 6 of the government.

Mr. WASHBURN: I now renew the offer of the Exhibits 11 and 12.

By Mr. RICHARDS: I think I will enter an objection on the part of defendant Tallas to Exhibit 12 on the ground that several maps have already been introduced in evidence,—government maps,—and used and verified as authority by the United States officers, presumably accurate, and covering various periods of time, and on account of the possibility of the misleading appearance of Exhibit 12 on account of the small size of the particular locality locus in quo in question in this case, and for the reason that it appears that the purposes of the plaintiff would be subserved by the map, Exhibit 11, to which no objection is made by the defendant Tallas.

No objection on the part of the defendant Whiteside.

The plaintiff thereupon announced that the taking of testimony in chief was concluded.

The hearing was resumed on Tuesday the 30th day of August, 1910, at eleven o'clock in the forenoon, before Hon. Henry  
124 F. Greene, Examiner, all parties appearing by their respective counsel as heretofore.

ANDREW TALLAS, being duly sworn, testified as follows:

Direct examination.

By Mr. RICHARDS:

Q. You are the defendant Tallas mentioned in these pleadings?

A. What, I don't understand.

Q. You are the defendant in this suit?

A. Yes.

Q. I call your attention to a part of the bill of complaint reading as follows (paragraph 20):

"That the defendant Andrew J. Tallas, some time since, without authority of law and without any right whatsoever so to do, entered upon the said low, marshy island, and has pretended to occupy the same in some manner and has placed thereon a small shack or cabin."

Now, I ask you, when this suit was begun by serving process upon you, were you living on that island and claiming exclusive possession and ownership of the whole of it?

By Mr. WASHBURN: I would like to enter an objection,

Mr. Richards, I do not want to object to everything, but just to



enter one objection here so that the form may stand. The plaintiff objects to the introduction of this or any other testimony on the part of the defendant Tallas tending to support his claim of title by possession or otherwise, for the reason that upon the face of the pleadings, including the answer of the defendant Tallas, it appears that said Tallas has not now nor has he ever had any right or title to the said island, or any part thereof, or any rightful possession thereof, or any part thereof; that there are no proper allegations in the answer of said defendant Tallas to support a claim of title by possession or otherwise, nor any proper pleading on his part to furnish a foundation for the introduction of such testimony against any other party to this suit, or upon which to found any claim for relief or any defense against the plaintiff's equitable cause of action as set forth in his bill in this suit, and the testimony is therefore incompetent, irrelevant and immaterial.

Now, Mr. Richards, of course that objection includes within it the application of what I claim is the law in the case and I do not want to delay all the time by repeating the objection, and if it may be understood that this objection may stand as to all of the testimony relating to possession, without repetition, I will not enter the objection along from question to question. I framed it broadly so it might do that. Is it agreeable?

125 By Mr. RICHARDS: There is no desire to force counsel to repeat this comprehensive objection that he makes to the several answers that may be produced from this witness, and therefore defendant's counsel does not desire to put the plaintiff's counsel to the necessity of repeating the full objection to each question. I shall only ask three or four questions any way.

A. Yes.

Q. Calling your attention to the date of the plaintiff's bill, January 26, 1910, I ask you where you were at that date?

A. I was at home there.

Q. Where were you between January 26", 1910 and February 14, 1910, when the papers were served on you, process in this suit?

A. On the island.

Q. Where were you when process in this suit was served on you,—the summons or subpoena?

A. On the island.

Q. In your house?

A. Yes.

Q. Since then have you continued to be in possession of this property?

Same objection as above.

A. Yes.

Q. To the present time?

A. Yes.



## Cross-examination.

By Mr. WASHBURN:

Q. Mr. Tallas, who served the subpoena in this case upon you?

A. Mr. Mallory.

Q. George Mallory?

A. I don't know his first name.

Q. Mallory of West Duluth?

A. Yes.

Before the Hon. Henry F. Greene, Examiner and on the Second day of September, 1910 the plaintiff offered in evidence the subpoena issued in this suit from the Circuit Court of the United States for the District of Minnesota, Fifth Division, running to Robert B. Whiteside, E. P. Alexander and Andrew J. Tallas, together with the return of the United States Marshal thereon, showing service upon the said several defendants, substituting for the original on file in the office of the clerk of said court the certified copy thereof, said document being marked Plaintiff's Exhibit 13, after which the plaintiff announced the taking of his testimony in rebuttal was closed.

126 (*Stipulation Waiving Signatures of Witnesses to Testimony.*)

It Is Hereby Stipulated between the parties to the above entitled suit that the signature of the witnesses who testified before the Examiner in said cause, to their testimony as taken by the stenographer and typewritten, be and the same are hereby waived. Dated, September 2", 1910.

WASHBURN, BAILEY & MITCHELL,  
*Solicitors for the Plaintiff.*

JAQUES & HUDSON AND

L. C. HARRIS,

*Solicitors for Defendant Whiteside.*

WILSON G. CROSBY,

*Solicitor for Defendant E. P. Alexander.*

DAN'L G. CASH AND

J. B. RICHARDS,

*Solicitors for Defendant Tallas.*

*Certificate of Special Examiner.*

I, Henry F. Greene, Special Examiner, appointed as such in the above entitled cause by order of said court, duly filed, do hereby certify that the foregoing testimony in the above entitled cause was taken before me at the times and places in the record thereof indicated; that the taking of the testimony in said cause was begun on the 11th day of July, A. D. 1910 and was closed on the 2nd day of September, A. D. 1910, and at each of said times and places during the taking of said testimony the complainants were represented by



Messrs. Washburn, Bailey & Mitchell, J. L. Washburn, Esq., appearing as counsel in said cause; and the defendant Robert B. Whiteside by L. C. Harris Esq. and Messrs. Jacques & Hudson, Alfred Jacques, Esq., appearing as attorney in the case and the defendant Andrew J. Tallas by Daniel G. Cash, Esq. and J. B. Richards Esq. and the defendant E. P. Alexander by Wilson G. Crosby Esq.

That before testifying, each of said several witnesses was by me sworn to tell the truth, the whole truth and nothing but the truth.

That said testimony was taken by Miss M. J. Tranah, Miss L. I. Feetham and Miss F. M. Emanuelson, stenographers acting by consent of counsel in said cause; that said testimony was taken in shorthand writing and afterwards reduced to typewriting by said stenographers;

That the signature to the testimony of all of the witnesses was expressly waived by the parties to said cause by virtue of a  
127 written stipulation filed in court; that none of said witnesses appeared after the giving of such testimony but departed before the same was written up.

I further certify that the foregoing record from pages one to one hundred and sixty five inclusive, contains a true and complete record of all of the proceedings had before me in said cause and all of the testimony taken and exhibits introduced in said cause before me.

I further certify and report that the various exhibits referred to in the foregoing record were marked at the times offered respectively as Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 and Defendant Whiteside's Exhibits A1, A2, and B by me for identification and are hereby transmitted to and filed in said court.

In Witness Whereof, I Henry F. Greene, Special Examiner as aforesaid, have hereunto set my hand this 3rd day of September A. D. 1910.

HENRY F. GREENE,  
*Special Examiner United States Circuit Court,  
District of Minnesota, Fifth Division.*

#### PLAINTIFF'S EXHIBIT 1.

##### *Stipulation of Facts.*

The following stipulation of certain facts is made between the parties to the above entitled suit, for the purpose of shortening the records, said stipulation to be received in evidence agreeably to the order of the Court heretofore made fixing the time for the taking of evidence &c.

1. That Township 49, Range 14 was surveyed by the United States in 1854 and the plat thereof approved July 17<sup>th</sup> of that year, and that Township 49, Range 15 was surveyed and platted in 1857 and the plat thereof approved that year.

2. That the lands of the plaintiff, described in the complaint, were platted by the United States to one Charles Knowlton in 1860, through whom, by various intermediate transfers the plaintiff derived title.



3. That the plaintiff as executor and trustee of the estate of George W. Norton, Deceased, under the will of said Norton and various decrees of the Probate Court of St. Louis County, Minnesota, where the said estate was duly probated, is the owner in fee of the lands described in the Fourth paragraph of the bill of complaint herein and of all of the riparian rights nor or heretofore appurtenant thereto, unless divested of any thereof by the possession of the defendant Tallas the portions thereof so described as being in Hunter & Markell's Grassy Point Addition to Duluth, being part and parcel of Government Lot 1 in Section 24 in said Township 49, Range 15.

4. That Lots 4 and 5 of Section 19 in Township 49 Range 14 and Lot 1 of Section 24, Township 49, Range 15, were entered in the year 1867 by private parties and patented on June 1", 1868 to the predecessors in interest of the defendant Whiteside; that Lot 1 of Section 30 in Township 49, Range 14 was entered April 29", 1859 and patented December 26" 1860 to the predecessor in interest of the defendant Whiteside; that as to the residue of the lands described in paragraph five of the bill of complaint, the same passed under certain land grants made by the Congress of the United States to the State of Wisconsin for the benefit of certain railroad companies in the year 1850, but that such controversies arose with respect thereto that the same were not finally adjusted and settled until a later date; Lot 2 of Section 24, Township 49, Range 15 being patented by the state under said land grant on March 1, 1889 to the predecessors of the defendants Robert B. Whiteside and E. P. Alexander, and the other tracts described in said paragraph five were likewise patented at still later date;

5. That the defendant Robert B. Whiteside is and for many years last past has been the owner in fee of all of the lands described in said paragraph five of said bill of complaint, together with all of the riparian rights now or ever heretofore incident thereto, unless divested of any thereof by the possession of the said defendant Tallas, except that the defendant E. P. Alexander is the owner of a small portion of said Lot 2 in Section 24, Township 49, Range 15, described in a certain deed dated September 1, 1909, and recorded January 13, 1910, in the office of the Register of Deeds of Douglas County, Wisconsin, being a deed made by Marshall M. Gilliam and others to said Alexander and numbered 179,857 in the registry thereof, together with such riparian rights and privileges as are incident to said tract.

Dated and signed, June 14", 1910.

WASHBURN, BAILEY & MITCHELL,  
*Solicitors for the Plaintiff.*

JAQUES & HUDSON,  
L. C. HARRIS,

*Solicitors for Defendant Whiteside.*

WILSON G. CROSBY,  
*Solicitor for Defendant Alexander.*

DAN'L G. CASH &  
J. B. RICHARDS,

*Solicitors for Defendant Tallas.*



(Deed—Marshall M. Gilliam et al. to Edward P. Alexander.)

Whereas Marshall M. Gilliam and Emma S. Gilliam, his wife, Algernon S. Buford and Mary C. Buford, his wife, and T. Wm. Pemberton and Mary E. Pemberton, his wife, of the County of Henrico, State of Virginia, as parties of the first part, did make and execute a certain deed of special warranty under seal and for a valuable consideration therein expressed, bearing date the 1st day of September 1903, in terms purporting to grant, bargain, sell, release, demise and convey to The Duluth Banking Company, a Minnesota corporation, the lands and premises hereinafter described situate in the County of Douglas and State of Wisconsin; and

Whereas said deed so executed was thereafter and on the 28th day of September, 1906, at 9 o'clock A. M. duly recorded in Book 96 of Deeds on page 371 in the office of the Register of Deeds in and for the County of Douglas, State of Wisconsin; and

Whereas The said The Duluth Banking Company has made no sale or disposition of said lands and premises before the execution of this instrument, to the knowledge of said Gilliam, Buford and Pemberton: and

Whereas the said The Duluth Banking Company was at the date of the execution of said deed and ever since has been and still is a corporation organized under the laws of the State of Minnesota and has never been authorized or licensed to own property or transact business in the State of Wisconsin and has therefore requested said Gilliam and wife, Pemberton and wife, and Buford and wife to execute this deed, as indicated by its writing in and executing this deed.

Now, Therefore, This Indenture Made this first day of September, 1909, by and between Marshall M. Gilliam and Emma S. Gilliam, his wife, Algernon S. Buford and Mary C. Buford, his wife, and T. Wm. Pemberton and Mary E. Pemberton, his wife, of the county of Henrico and State of Virginia, and The Duluth Banking Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, parties of the first part, and Edward P. Alexander of the City of Duluth, County of Saint Louis and State of Minnesota, party of the second part, Witnesseth:

That the parties of the first part in consideration of the premises and of the sum of Nine Hundred Dollars (\$900.00)  
130 to said The Duluth Banking Company paid by said party of the second part, receipt whereof is hereby acknowledged by said The Duluth Banking Company, do hereby grant, bargain, sell, demise, release and convey unto the said party of the second part, his heirs and assigns, forever, all the following tracts or parcels of land lying and being in the County of Douglas and State of Wisconsin, described as follows, to-wit:

All that part of Lot two (2) Section twenty-four (24) Township forty-nine (49) Range fifteen (15) West described as follows, to-



wit: Commencing at a point on the East and West section line eighteen hundred and fifty-eight and eight tenths feet (1858.8) from the section corners of sections nineteen (19) thirty (30) twenty-four (24) and twenty — (25) Township forty-nine (49) Range fifteen (15) West, thence northerly five hundred (500) feet, thence West and parallel to said section line to the Bay of Saint Louis and Southerly along the shore line of Saint Louis Bay to a point where said shore line intersects the section line between Sections twenty-four (24) and twenty-five (25) Township forty-nine (49) Range fifteen (15) thence East on said section line to place of beginning containing — acres more or less including all Riparian Rights.

To Have And To Hold The Same, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining, to the said party of the second part, his successors or assigns forever. And the said T. Wm. Pemberton, Marshall M. Gilliam and Algernon S. Buford, three of the said parties of the first part, do covenant with the said party of the second part, his heirs or assigns, each as to himself only, that they have not made, done, executed or suffered any act or thing whatsoever, whereby the above described premises or any part thereof now or at any time hereafter shall or may be imperiled, charged or incumbered in any manner whatsoever; and the title to the above granted premises against all persons lawfully claiming the same from, through or under them will forever Warrant And Defend: it being distinctly understood that by these covenants each of said parties covenants solely as to himself and to the extent of his interest in said property and not as to any other grantor herein.

131 In Testimony Whereof, The said parties of the first part have hereunto set their hands and seals the day and year hereinbefore written.

A. S. BUFORD.	[SEAL.]
MARY C. BUFORD.	[SEAL.]
MARSHALL M. GILLIAM.	[SEAL.]
EMMA S. GILLIAM.	[SEAL.]
T. WM. PEMBERTON.	[SEAL.]
MARY E. PEMBERTON.	[SEAL.]
THE DULUTH BANKING	
COMPANY,	

By HENRY F. GREENE,  
[CORPORATE SEAL.] *Its Vice President.*

Signed, Sealed and Delivered in the Presence of

RO. H. GILLIAM.  
A. H. BROWN,  
G. W. BUCK,

*Witnesses as to Henry F. Greene, Vice-Pres.  
of the Duluth Banking Company.*

SUSAN J. STRATTON.



## STATE OF VIRGINIA,

*City of Richmond, County of Henrico, ss:*

On this 8<sup>th</sup> day of November, 1909 before me, a notary public within and for said City of Richmond, personally appeared Marshall M. Gilliam and Emma S. Gilliam, his wife, Algernon S. Buford and Mary C. Buford, his wife, and T. Wm. Pemberton and Mary E. Pemberton, his wife, to me known to be six of the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed and the said Marshall M. Gilliam and Emma S. Gilliam, Algernon S. Buxford and Mary C. Buford and T. Wm. Pemberton and Mary E. Pemberton acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.]

RO. H. GILLIAM,

*Notary Public, City of Richmond, Virginia.*My commission expires Ap'l 28<sup>th</sup> 1912.

## STATE OF MINNESOTA,

*County of St. Louis, ss:*

On this 1st day of November, 1909, before me, a notary public, within and for said county and State personally appeared Henry F. Greene, who being by me first duly sworn did say that he is the Vice President of The Duluth Banking Company, the corporation described in and which executed the foregoing instrument; that the seal affixed to said instrument is the Corporate Seal of said corporation: that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and  
132-139 the said Henry F. Greene acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.]

A. H. BROWN,

*Notary Public, St. Louis Co., Minnesota.*

My Commission expires Nov. 6, 1915.

Endorsed.

## OFFICE REGISTER OF DEEDS,

*Douglas County, Wis., ss:*

I hereby certify that the within instrument was filed in this office for record on the 13th day of Jan. A. D. 1910, at 2 o'clock P. M. and was duly recorded in Book 109 of Deeds, Page 66.

[SEAL.]

HELGE JOHNSON,

*Register of Deeds.*



## PLAINTIFF'S EXHIBIT 10.

*(Stipulation as to Introduction of Maps.)*

It is hereby stipulated between the parties to this suit that the following public plats may be introduced in evidence in this suit without certification:

1. Plat of Township 49 Range 14 in the State of Wisconsin;
2. Plat of Township 49, Range 15 in the State of Wisconsin;
3. Plat of Township 49, Range 15 in the State of Minnesota;

the same being all procurable from the land offices of the Department of the Interior.

4. That blue print, photograph, lithograph or printed copies of maps and plats which are in use in the United States Engineer's office in the city of Duluth, with identification as such and without certification, may be introduced in evidence by either party and the same shall include, if either party so desires, the following maps:

(a) Map of J. N. Nicollett of 1843 from surveys made by him during the years 1836 to 1840.

(b) Map of Lieut. H. W. Bayfield, R. N. made between the years 1823 and 1825;

(c) Map of Cap. George E. Meade and Lieu. Col. J. D. Graham, made in the year 1861;

(d) Map of Maj. Charles J. Allen and John B. Parkinson in 1884-1885;

(e) Map of the Duluth side of the harbor at Duluth, Minnesota, and Superior, Wisconsin, of Maj. Clinton B. Sears made in 1899 and approved by the Secretary of War November 17", 1899;

(f) Map of the Superior side of the harbor at Duluth, Minnesota and Superior, Wisconsin, made by Maj. Clinton B. Sears in 1898 and approved by the Secretary of War November 17", 1899;

(g) Chart of the harbor at Duluth, Minnesota and Superior, Wisconsin prepared under the direction of Major W. L. Fisk, Corps Engineers United States Army 1902 to 1905 with additions and corrections under the direction of Col. G. J. Lydecker, Corps U. S. Engineers 1906-1907.

141-147 All of said maps in this subdivision numbered 4, relating to the waters of the head of the Duluth-Superior Harbor and the waters connected therewith, and the various data inscribed upon any of said maps shall be taken prima facie proved by the introduction thereof.

Dated and signed this 14th day of June, 1910.

WASHBURN, BAILEY & MITCHELL,  
*Solicitors for Plaintiff.*

JAQUES & HUDSON,  
L. C. HARRIS,

*Solicitors for Defendant Whiteside.*

WILSON G. CROSBY,

*Solicitor for Defendant Alexander.*

DAN'L G. CASH &  
J. B. RICHARDS,

*Solicitors for Defendant Tallas.*



That the decision of the Court in said cause made orally on the 7th day of February, A. D. 1911 and thereafter transcribed by the Court Reporter, is in the words and figures following, to-wit:

MORRIS, *Judge* (orally, deciding the case at the conclusion of the argument):

After the careful, able and exhaustive arguments of counsel in this case, and the complete threshing-out and sifting of the questions here involved in nearly eight days of discussion by counsel, and between court and counsel, of the cases bearing thereon, it seems to me that I am now able to form as correct a judgment on those questions, and to decide them correctly, as I can ever be. I do not think, therefore, that it will be necessary for me to take this case under advisement, but that I had better [decided] it now, and put you gentlemen at once upon the road to the court of appeals, to which court I apprehend it must go, no matter what may be my decision.

I shall not attempt to review in detail the cases which have been so ably discussed by counsel, but shall only state the conclusions to which I have come as a result of the discussion.

Mr. Washburn in his argument has expressed a desire that I make a finding on the question of fact as to whether or not the waters here involved, lying between the shore-line of the plaintiff on the one side and of the defendants Whiteside and Alexander on the other, are waters of a bay, or arm, of Lake Superior, that is, waters of Lake Superior, or waters of the Saint Louis River. I do not think it necessary to do this, because, in my view, the result must be the same in either case. But I will say that it seems to me that the river certainly extends to a point below the waters here involved. And indeed, although those waters are designated on the maps of the government surveys as "Saint Louis Bay," yet, in view of the language used in the Enabling Act as to the northerly and northwesterly boundary of the State of Wisconsin, and in view of the map therein referred to (Nicollet's Map), a copy of which is here in evidence, I would feel obliged to find that the St. Louis River extends to what is commonly known as the "Wisconsin entry," between Minnesota Point and Wisconsin Point, and that its mouth is there. But, as I have before said, I do not think for the purposes of this case a finding on that question is necessary, because the result, as I view it, must be the same whether these waters are river waters or

149 waters of an arm of Lake Superior. Whatever the character of these waters, the boundary line between Wisconsin and Minnesota as defined by this enabling act would, in my opinion, under the decisions read and commented upon by Mr. Harris, follow the main navigable channel between Big Island and the Minnesota shore, that is, between the shore line of the plaintiff on the one side and the shore line of the defendants Whiteside and Alexander on the other.

The first question arising here is the question of the jurisdiction



of this court to entertain this suit as between the plaintiff and the defendant Whiteside (as I understand it, it has been stipulated by counsel for Alexander that the decision as to Whiteside shall be binding as to Alexander), and that question depends upon whether or not the locus in quo here involved, that is, the land under water and the island formed thereon opposite Norton's shore line lying between the improved, or government, channel, and what was formerly the natural channel, is now in the State of Wisconsin or in the State of Minnesota. I have no doubt that prior to the making of this improved, or government, channel this land was in Wisconsin, and the question is, Has it by the construction of this improved, or government, channel, under the paramount authority of the general government to control these waters and to improve the same, of which there can be no doubt, been transferred from the State of Wisconsin to the State of Minnesota? I think there can be no doubt, under the decisions, that if the original, or natural, channel had been shifted or changed by natural causes so that this land would now lie on the Minnesota side of said natural channel, such change or shifting of the channel would have transferred it to the State of Minnesota, and it seems to me that the [principal-s] underlying those decisions and their reasoning, so far as it is logical and correct, would cause the same result to follow from the government improvement. It should always be remembered that this channel made by the government is an improvement of the natural channel under the paramount authority of the government to protect, preserve and improve the navigation of all these waters. A glance at the maps will show that while portions of the natural channel remain, and that such portions are still navigable by boats of heavy draught, still this channel no longer exists as a continuous channel and such portions are mere offshoots, or spurs, or pockets, diverging from the improved channel. As for instance, the portion of the former natural channel now lying behind the island at the locus in quo and between it and the Minnesota shore. In other words the improved, or government, channel has been made in lieu of or as a substitute for the natural channel, and for the purpose of improving the navigation of that channel. The old, or natural, chan-

150 nel has been in effect straightened and rendered more suitable for the purposes of navigation by craft of all descriptions and sizes, and thus the improvement comes fairly and justly within the power of the government. I can see no valid or just reason why the same results as to the boundary between the states should not follow from the making of this improved channel as would have followed if the change had been brought about by natural causes. So that, I think this question of jurisdiction must be answered in the affirmative.

That being determined, the next question is, To whom does the right to use, occupy and improve the locus in quo belong, to the plaintiff Norton, or to the defendant Whiteside? The answer to this question must, in my opinion, be the same as to this island which has been formed as it would have been if the land had remained under water as it was at the time of the government sur-



vey. The right or title to use and occupy the island arises from the right or title to use and occupy the submerged land on which it is formed, and the character and extent of that right or title always remains the same. As to this right I think the decisions in Minnesota and Wisconsin are in practical effect the same. While this right, either as to the submerged land or an island formed thereon, is a property right, a valuable right, and a right which can be severed from the shore land by the owner thereof and deeded away to others, yet it is a right arising out of and existing by virtue of the riparian proprietorship, and its nature always continues the same whether severed from the riparian proprietorship or not. In the brief of Mr. Washburn a case is cited, *Scranton v. Wheeler*, 179 U. S. 141, in which Mr. Justice Harlan, speaking of the rule in Michigan, uses the following language:

"But it is equally settled in that state that the rights of the riparian owner are subject to the public easement or servitude of navigation" (citing cases). "So that whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for the purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public, navigable river, his title is not as full and complete as his title to the fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare, technical title,

not at his absolute disposal, as is his upland, but to be held  
 151 at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right or navigation."

This is clear language, and, while it is now settled that grants of public lands bounded by streams or other waters must be construed as to their effect according to the decisions of the state in which the lands lie, it throws, to my mind, light upon all the state decisions. The confusion in these decisions, where any confusion or doubt may seem to exist, arises, I think, from what Judge Jaques has aptly called the terminology of the decisions. I do not know but that I may thus have caused some confusion or doubt in the decision in *Hobert v. Hall*, 174 Fed., 433. Judge Jaques, as I understood him, claimed in his argument that the decisions in Minnesota and Wisconsin were in practical accord on the questions here involved, and I think in this he was correct. I think the result of those decisions may fairly be [summerized] as follows: That a grantee from the government of lands bounded by a stream navigable in fact takes the absolute title in fee to the water's edge; that the state has title to the soil or land under the water between the edge of the stream and the middle thread of the main navigable channel thereof in its sovereign capacity in trust for the purpose of protecting, preserving and improving the public right of navigation; that such right, title,



or ownership, [wh-tever] we may call it, of the state is paramount, but not proprietary, or one under which it can [alocate] or convey any portion of said soil or land under water to a stranger, but, while paramount, is a limited title or ownership, limited to that purpose and extending no further; that the riparian owner has also a right or title to such soil or land under water opposite his shore land, between the edge of the stream and the middle thread of the main navigable channel thereof, which, though subject and subordinate to this title of the state, is proprietary, and exclusive as to all others than the state or the general government and even as to the state or general government exclusive, except as they may act by their properly constituted authorities in protecting, preserving, or improving the public right, and which he can convey to another either in whole or in part; that the limit to this private right, so long as it exists, is imposed by the public right and by that only, and the private right, so long as it exists, exists to the extent beyond which it would be inconsistent with the public right and with that only; that under this right, title, or [ownership,] whatever we may call it, the riparian owner or his grantee has the exclusive right to re-

152 claim, occupy and use for any purpose not inconsistent with the public right such soil or land under water or any part thereof out of the main navigable channel, subject only to such paramount right of the state or of the general government; and that the same right or title would exist as to any island between the shore line of the riparian proprietor and the main navigable channel of the stream, whether such island exists at the time of the survey and is omitted therefrom in good faith and without palpable mistake as a negligible fraction, or is afterwards formed by the gradual action of the waters. But, as said by Mr. Justice Harlan, this is a qualified right or title, if we may call it a title. It is not an indefeasible right or title. It is one which, while it may be granted to another, and which, while it exists, is exclusive and will support an action of ejectment, may yet be terminated and defeated even against the will of the riparian proprietor or his grantee. It may be defeated by a change in the channel of the river either from natural causes or by the action of the state in the exercise of its paramount authority. And over and above, and paramount to, this right or title of the state and this right or title of the riparian proprietor is the right of the general government on inter-state waters, such as those here in question, to protect, preserve and improve the navigation of those waters. I think there can be no doubt that prior to the construction of this improved channel by the government Whiteside had this right on the south side and up to the natural navigable channel, which would include the locus in quo, and that Norton's right extended only to this natural navigable channel on the north side. But I think that under the principles of the decisions and the reasoning thereof, if this natural navigable channel had been changed or shifted by natural causes so as to [—] through the locus in quo to the north side of said channel, that Whiteside's right would have ceased or been defeated, and that then this right would have belonged to Norton by virtue of his riparian proprietorship on the north, or



Minnesota, side. In other words, that by the shifting of the channel the right or title, call it what you may, would have shifted; and this whether the locus in quo still remained land under water or had become in whole or in part an island. I think, too, that under the principles and reasoning of the adjudicated cases the same result would follow from the change in the channel by the government improvement. The holder of this right, arising from and existing by virtue of riparian proprietorship, holds it always with knowledge and notice of this paramount authority in the government, and whatever he may do, or whatever improvement he may make, will be done in the face of this knowledge and notice, and having this knowledge and notice he has no just right to complain.

153 A different question might arise, and the principle of estoppel might be invoked against the state or general government, if prior to the making of an improvement by the shore owner, or his grantee, of the exercise of this right of use and occupancy, a harbor or dock line had been established by proper governmental authority. But that question does not arise here.

It seems to me that the foregoing conclusions solve equitably and without substantial injustice to anyone the questions here involved, and will solve all similar questions which may arise on these waters, and will prevent [in-umerable] complications which might otherwise exist. I think they are fully and fairly supported by the principles laid down in the decisions and the reasoning thereof, and if in doubt I would so hold in the absence of direct and controlling judicial authority. It seems to me, therefore, that the relief asked for in the bill by the complainant as against the defendants White-side and Alexander should be granted.

As to the defendant Tallas, it appearing by the evidence that he is in the actual possession of the locus in quo, or a part of it, it seems to me that under the decisions cited and read by Mr. Richards the court is without jurisdiction to determine those rights in this suit, but that they must be determined in an action at law.

As to him, therefore, it seems to me that the bill will have to be dismissed.

Counsel for complainant will prepare a decree in accordance with the foregoing views, and the terms of that decree can be hereafter settled by the court, upon notice to all the counsel.

Endorsed: Remarks of the Court in deciding case. Filed July 14, 1911. Louise B. Trott, Clerk. By Thos. H. Pressnell, Deputy Clerk.

*(Petition of Complainant for Order for Reargument of Question of Jurisdiction as to Defendant Tallas. Filed Feb. 13, 1911.)*

Now comes the plaintiff in the above entitled cause and petitions the court for a re-argument of the question of the jurisdiction of this court raised by counsel for the defendant Tallas, and involving the question of whether this suit should be dismissed as to the said defendant Tallas, or whether this court should not, under the cir-



cumstances of this cause, determine the same upon the merits as to all of the defendants.

154 In submitting this application on behalf of the plaintiff, counsel for the plaintiff states that he did not devote any time to speak of in his argument to the discussion of the question of jurisdiction raised on the argument by the defendant Tallas' counsel, because he believed,

First. That this cause was not such a one as made such objection available to the said defendant Tallas;

Second. Because he believed it was too late for said defendant to raise such objection; and,

Third. Because he believed it was clear that this court had jurisdiction both of the subject matter and of all of the parties to this cause.

It was therefore a surprise to the counsel for the plaintiff that the Court gave such consideration to this objection on the part of the defendant Tallas as to indicate, after the close of the arguments, his view that the said defendant should be dismissed and that, in order to get the relief that the plaintiff might be entitled to as to him, a proceeding by way of ejectment in a court of law would have to be instituted

Since the argument, the counsel for the plaintiff has made some examination of this question, and certifying to his belief that the authorities, as applied to the circumstances of this case, will sustain the jurisdiction of the court to determine that under the authorities it is the duty of the Court to determine the whole cause, the plaintiff, by his counsel, respectfully asks the court for a re-argument and for leave to further argue this jurisdictional question raised by the counsel for the defendant Tallas, and that the court either make an order setting a day when it will hear such further argument, or issue an order to show cause why such hearing should not be had, and that in the meantime the settlement of the form and entry of decree in said cause be stayed.

J. L. WASHBURN,  
*Of Washburn, Bailey & Mitchell, Coun-  
sel for the Plaintiff, 1600 Alworth  
Bldg., Duluth, Minnesota.*

*(Order Granting Reargument upon Question of Jurisdiction.)*

Upon the foregoing application, it is ordered that a reargument may be had by the counsel for the plaintiff and counsel for the defendant Tallas upon the question of the jurisdiction of this court in this action to determine the issues of this cause upon the merits as to the said defendant Tallas, as set forth in the foregoing application, and counsel may be so heard at the Chambers of this Court in the City of Duluth in said District and state on the 18th day of February 1911, at ten o'clock A. M., unless cause be shown to the contrary.

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In the mean time let the settlement of the form and entry of decree be stayed until such re-argument be heard and determined or other wise disposed of.

Let a copy of this order be served upon the counsel for the defendant Tallas at least four days before the said day of hearing.

Dated February 13", 1911.

PAGE MORRIS,  
*Judge of the Above-named Court.*

Endorsed: Personal service of the within Petition by copy admitted this 13th day of February, 1911. D. G. Cash & J. B. Richards, Counsel for Def't Tallas. Filed Feb'y 13, 1911. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That on the 18th and 20th days of February, A. D. 1911, proceedings upon said motion were had in open Court, as follows, to-wit:

SATURDAY, February 18, A. D. 1911.

The above entitled cause coming on to be heard upon the complainant's petition for a re-argument of the question of jurisdiction of the Court as to defendant Tallas, Messrs. Washburn, Bailey & Mitchell appear on behalf of the complainant in support of said motion, and Messrs. J. B. Richards and D. G. Cash appear on behalf of defendant Tallas in opposition thereto; whereupon proceedings are had thereon as follows, to-wit:

J. L. Washburn, Esq., states his motion and makes his opening argument in support thereof.

J. B. Richards, Esq., argues in opposition thereto.

And said argument not being concluded at the hour of adjournment it is, by the Court

Ordered: That further proceedings herein be, and they hereby are postponed and continued until Monday morning at ten o'clock.

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MONDAY, February 20, A. D. 1911.

This day come again the parties to said cause, by their respective solicitors, and further proceedings are had therein, as follows, to-wit:

J. B. Richards, Esq., continues and concludes his opening argument in opposition to complainant's petition.

J. L. Washburn, Esq., makes his closing argument.

And here the arguments are closed and the matter submitted.

And having heard the arguments and statements of the solicitors for the respective parties, being fully informed in the premises, the matter is by the Court taken under advisement.

*(Decision of Court upon Question of Jurisdiction, etc.)*

Leave for further argument upon the question of jurisdiction of this court to determine in this suit issues between the plaintiff and the defendant Tallas having been granted, and such further argument having been had before the court by the respective counsel for



the plaintiff and for the defendant Tallas, on the 18th and 20th days of February, 1911; now, after such argument, and upon further and more full consideration, the court being of the opinion that such right or title as the plaintiff may have to the part of the premises of which the defendant Tallas is in possession is a legal right or title, and that the plaintiff has a certain, complete and sufficient remedy at law against the defendant Tallas, the Court adheres to its former ruling, and directs that the decree be drawn as heretofore indicated, and that in said decree it shall be specifically provided that the bill is dismissed as to the defendant Tallas without prejudice to the right of the plaintiff to institute an action at law against said defendant.

By the Court:

PAGE MORRIS, *Judge*.

Dated, February 24th, A. D. 1911.

Filed in the Circuit Court on Feb. 24, 1911.

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(*Decree.*)

That on the 14th day of July, A. D. 1911, there was filed with said Clerk the Decree of the Court in said cause in the words and figures following, to-wit:

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Complainant,

vs.

ROBERT B. WHITESIDES, E. P. ALEXANDER, and ANDREW J. TALLAS, Defendants.

This cause came on to be heard at this term, and was heard upon the pleadings and upon the proofs taken before Hon. Henry F. Greene, who had been appointed special examiner by order of the court dated May 26, 1910, and upon the report of such evidence made by said Greene, dated September 3rd, 1910.

This case was argued by counsel appearing for the respective parties, Mr. J. L. Washburn for the Complainant, Mr. Alfred Jacques and Mr. L. C. Harris for the defendant Whiteside, and Mr. J. B. Richards for the defendant Tallas. Mr. Wilson G. Crosby appeared for the defendant Alexander but submitted no argument, it having been stipulated that the interest of said Alexander should abide the decision as to the interest of said defendant Whiteside.

From the consideration of all of which, the court is of the opinion and doth adjudge and decree as follows:

1. That the matter in dispute in this cause, exclusive of interest and costs, exceeds the sum of Two Thousand Dollars, and that the court has jurisdiction in the premises.

2. That the plaintiff, George W. Norton, as executor and trustee of the estate of George W. Norton, deceased, is and for several years last past has been, the owner in fee of government lot one (1), sec-



tion twenty-three (23) and the northeast quarter of the northeast quarter of section twenty-three (23), and government lot two (2) of section twenty-four (24), all in township forty-nine (49) north, of range fifteen (15) west, and of Lots "A" and "B" in block forty-one (41), Lots "C" and "D" in block forty (40), Lots "G" and "H" in block thirty-seven (37), Lots "I" and "J" in Block thirty-eight (38), Lots "K", "L", "M" and "N" in block forty-two (42), all in Hunter & Markell's Grassy Point Addition to Duluth, according to the recorded plat thereof, said platted lots being part and parcel of government lot one (1) of section twenty-four (24), in township

forty-nine (49) north, of range fifteen (15) west, together with all of the appurtenances thereunto belonging or in anywise appertaining, including all of the riparian rights incident to the ownership of said lands and now or heretofore appurtenant thereto, unless divested of any thereof by virtue of the possession by the defendant Tallas of a certain unsurveyed island hereinafter referred to.

3. That the defendant Robert B. Whiteside is and for a number of years last past has been the owner in fee of lots four (4) and five (5) in section nineteen (19), township forty-nine (49) north, of range fourteen (14) west, and lots one (1) and two (2) of section twenty-four, and lots one (1), two (2) and three (3) of section twenty-five (25), all in township forty-nine (49) north, of range fifteen (15) west; also lot two (2) of section twenty-four (24), township forty-nine (49) north, of range fifteen (15) west, except a small parcel in said lot two (2) conveyed to the defendant Alexander on or about the first day of September, 1909, by Marshall M. Gilliam and others and described as follows:

"All that part of Lot two (2) Section Twenty-four (24) Township Forty-nine (49) Range Fifteen (15) West, described as follows to-wit: Commencing at a point on the east and west section line eighteen hundred and fifty-eight and eight tenths feet (1858.8) from the section corner of sections nineteen (19), thirty (30) twenty-four (24) and twenty-five (25), township forty-nine (49) Range Fifteen (15) West, thence northerly five hundred (500) feet, thence west and parallel to said section line to the Bay of Saint Louis and southerly along the shore line of Saint Louis Bay to a point where said shore line intersects the section line between Sections Twenty-four (24) and Twenty-five (25), Township Forty-nine (49), Range Fifteen (15), thence east on said section line to a place of beginning, containing — acres more or less including all riparian rights".

That said Whiteside and Alexander are the owners of all riparian rights now or ever heretofore incident to the said lands so found to be owned by them respectively, unless divested of any thereof by the possession on the part of the defendant Tallas of some portion of said unsurveyed island mentioned in the foregoing paragraph and hereinafter referred to,

4. That said township forty-nine (49), range fourteen (14) west surveyed by the United States in 1854 and plat thereof approved July 17th of that year, and that township forty-nine (49), range



fifteen (15) was surveyed and platted in 1857, and the plat thereof approved that year.

5. That the lands of the plaintiff above described were patented by the United States to one Charles Knowlton, in 1860, through whom, through various intermediate transfers, the plaintiff has derived title; that lots four (4) [abd] five (5) of section nineteen (19), township forty-nine (49), range fourteen (14), and lot one (1) of section twenty-four (24), township forty-nine (49), range fifteen (15), are entered in the year 1867 and patented by the United States on June 1st, 1868. That lot one (1) of section thirty (30), township forty-nine (49), range fourteen (14), was entered April 29th, 1859, patented December 26th 1860, and that the residue of the lands above described as belonging to the defendant Whiteside passed under certain land grants made by the congress of the United States to the State of Wisconsin for the benefit of certain railroad companies in the year 1850, and subsequently were patented, the said defendant Whiteside having succeeded by mesne conveyances to the interest of all of the patentees.

6. That all of the lands here involved were part and parcel of the lands comprised in the tract of country formerly known as the Northwest Territory, organized under the Ordinance of 1787, and that by the terms of that ordinance and subsequent acts of congress passed prior to the disposition of any of the public lands therein contained, it was provided that the navigable waters leading into the Mississippi and St. Lawrence rivers should be and forever remain common highways, free forever to the inhabitants of said territory and the citizens of the United States and those of other states that may be admitted into the confederacy, and it is considered by the Court and adjudged that the Federal Government retained over such navigable waters, and over the regulation of commerce thereon, the paramount control, including the power to improve the same in aid of navigation and commerce, and that among others the State of Wisconsin and a part of the State of Minnesota were formed out of said territory.

7. That in the enabling act of the congress of the United States for the formation of a constitution and state government in Wisconsin Territory, approved August 6th, 1846, the northerly and westerly boundary of the State of Wisconsin was described in part as follows:

"Thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same above the Indian Village, according to Nicollet's map; thence due south to the main branch of the St. Croix River."

And that in the enabling act passed by the congress of the United States to authorize the people of the Territory of Minnesota to form a constitution and state government, approved February 26th, 1857, the southerly, easterly and northeasterly boundaries of said future state were described as follows:

"Thence east, along the northerly boundary of the State of Iowa



to the main channel of the Mississippi River; thence up the main channel of said river, and following the boundary line of the State of Wisconsin, until the same intersects the St. Louis River; thence down said river, to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British possessions'.

and these were the descriptions of the boundaries, so far as given above, embraced in the constitutions under which the said states were formally admitted into the Union.

8. It is considered by the court that the Saint Louis River is substantially correctly described in the bill of complaint down to the first falls above Fond du Lac, or the Indian Village. But it is not considered by the court necessary in this case to determine where the river ends and the lake begins; nor whether the waters at the locus in quo are more properly designated as waters of the lake or of the river, for, in the view of the court, the result in the case must be the same whether these waters are river waters or waters of an arm of Lake Superior. Whatever the character of these waters, the boundary line between Wisconsin and Minnesota would in the opinion of the court, and it is so found, follow the main navigable channel between Big Island and the Minnesota shore, that is, between the shore line of plaintiff on the one side and the shore line of defendants Whiteside and Alexander on the other.

9. It is considered by the court and therefore adjudged that these waters, up to the first falls above the Indian Village, which is substantially synonymous with the old town of Fond du Lac now within the corporate limits of the City of Duluth, are and ever have been navigable and that boats and vessels of various tonnage and draft navigating the Great Lakes have from the earliest times navigated such waters as far up as the said falls and the same, at all times since the settlement of the country, have been navigated by multitudinous small craft operating more distinctly upon the head waters of the lake.

10. That the lands of the defendants Whiteside and Alexander are situated upon and substantially constitute a large island known at various times by different names such as "The Island", "Big  
161 Island," "Clough's Island", &c., there being a channel of navigable water upon both the northerly and southerly sides of said island.

11. That the so-called "Big Island", was at the time of the surveying and platting of said townships, treated as in the State of Wisconsin, and the boundary line between the states of Wisconsin and Minnesota has ever since said time been acquiesced in by the said states as running through, and does run through, the waters between said Big Island and the northerly shore of said waters, and the lands of the plaintiff and said defendants abut upon the said boundary waters.

12. That the said waters at the locus in quo were designated upon the government plats of the survey of said townships as St. Louis Bay, and are claimed by the plaintiff to be part of the waters



of Lake Superior and by the defendants to be an expansion of the St. Louis River. That the said waters at the locus in quo, between Big Island and the lands of plaintiff, are about 2,000 feet wide, and the [the] course of the main navigable natural channel through the same was sinuous, in some places being nearer one shore than the other, and the same is indicated upon Plaintiff's Exhibit 6 introduced in evidence, and the boundary line between said states followed the middle thread of said main navigable natural channel up to the time of the making of the improved or government channel.

13. That the bill alleges, and the answer of defendant Whiteside admits, and it is so found by the court as between them, that subsequent to the survey of the public lands upon both sides of said waters and the disposition thereof by the government, there gradually became formed a low, marshy, irregular shaped island in the waters between the lands now owned by the plaintiff and those of the defendant Whiteside, which since said time has at times been entirely covered with water and has changed in contour, extent and form. It is further found that the same has never been surveyed, platted or disposed of as public land, and it is considered by the court that the same vested, like other parts of the bed of said waters, and is therefore, notwithstanding that for some years it appears to have arisen permanently above the water, in part at least, to be held in trust by the same character of title and for the same purposes as the residue of the bed or sub aqueous land, and that no person can acquire private ownership thereof or control over the same in any manner, except such as inhere in the owners of the shore lands abutting, upon said waters over the same or such part thereof as fall within the zone of their respective riparian rights and privileges, and that subject to the public rights and subject to the paramount

control of the government, such riparian owners as may be  
162 entitled thereto, have the exclusive right, control and use of the same.

15. That under the Act of Congress of September 19, 1890, the War Department of the United States established dock lines on the Minnesota and Wisconsin sides in the Duluth-Superior harbor, through the waters at the upper end of Lake Superior, including the waters at the locus in quo, which were approved December 5th, 1894; that such dock line upon the Minnesota side in front of the lands of the plaintiff hereinbefore described, extended through the said low, marshy island and, the dock line on the Wisconsin side in front of the lands of the defendants Whiteside and Alexander, was some distance to the southward of said island.

15. That under the Acts of Congress of June 13th, 1892, June 3rd, 1896, and March 3rd, 1899, the War Department of the United States made a survey and examination of said waters, re-established said dock lines through and upon both the Minnesota and Wisconsin sides, the same being at some points nearer and at some points farther from the respective shores than the dock lines previously established, and the same were established with a view to the immediate improvement of the deep water channel through said waters in the aid of navigation and commerce. That said last established



dock line in front of the plaintiff's said premises, is substantially identical with the one previously established, but on the Wisconsin side, in front of the defendant Whiteside's premises, it is at some points farther from the shore of defendant's lands and at some points nearer thereto, but at all places is southerly from the so-called marshy island hereinbefore described and from the improved channel in said waters hereinafter referred to.

16. That the map and survey of such harbor and dock lines and of the proposed improvement in said harbor, including the improvement of the channel through the waters between the lands of the plaintiff and the lands of the defendants Whiteside and Alexander, were approved by the Secretary of War under the authority of the Congress of the United States on November 17th, 1899, and that the dock and harbor lines upon the Minnesota side in said waters in front of the lands of the plaintiff, extended through the said low, marshy island above mentioned, and likewise the improved channel through said waters as proposed by the War Department and as shown by the survey and map which were introduced in evidence, in pursuance of said act of Congress, passed through said island.

163 17. That the said War Department, under the authority of Congress, including the acts above mentioned, and with funds appropriated by Congress for that purpose, prosecuted the said improvement within the said harbor lines, in accordance with said survey and map, and improved, deepened and [straightened] the navigable channel through said waters between the said harbor lines, the said improved channel crossing and recrossing the original course of the deepest water, but running generally in the same direction and practically midway between the shores, and operating in the aid of navigation and commerce to deepen and straighten the navigable and navigated channel in the said waters, between the shores thereof, and make the same more practicable, and that in the making of said improvement the said War Department cut through the said low, marshy island, leaving a small part thereof between the harbor or dock line on the Minnesota side of the shore of the plaintiff's said lands and the residue thereof between said deep water channel and the established harbor line on the Wisconsin side in front of the defendant Whiteside's lands, and this latter parcel afterwards disappeared and no longer exists.

18. That in the improvement of said channel the government dredged out a large amount of material and deposited the same over and upon the said portion of said island remaining upon the northerly side of said channel and along by the side of said improved channel and in extension of said portion of said island remaining as appears more fully upon the government chart introduced in evidence.

That by reason of the depositing of said dredging material there is now much more land appearing above the water than appeared formerly before said improvement was made, the same operating to build a reef of land extending above the water, lying between the said improved navigable and navigated channel and the original



Minnesota main shore. The original deep-water channel through the waters in front of plaintiff's said lands has been entirely closed at a point opposite said lands by reason of the depositing of said dredging material and the formation of said reef of land, and while the government chart, Plaintiff's Exhibit 9, shows that there still remains behind said reef of land and between it and plaintiff's shore land a part of the original deep-water channel, as to the present depth of which the evidence is not clear, which since the improved channel has been made is a kind of spur, or offshoot, from the improved channel, and is connected therewith at a point east of plaintiff's lands, yet this original deep-water channel, having as above described been closed, no longer exists as a continuous chan-

164 nel, and this part, or spur, thereof is no longer a part of the navigated and navigable channel of the waters in front of these lands, having been abandoned as such by the government, and it is apparent that the same will gradually become more and more shallow by the natural action of the waters. So that, the plaintiff is deprived of access to the improved navigable and navigated channel of said waters in front of his said premises, save by extending out over the shallow water and this spur of the original deep-water channel and across said portion of said unsurveyed island remaining and the said made land.

19. That one of the principal elements of value to plaintiff's said land is the right of access, of wharfage or other improvement to the navigable water in front thereof.

20. That the defendants Whiteside and Alexander now have access to the navigable water from and in front of their said lands, free from any impediment whatever.

21. That all of the defendants claim that the boundary line between the states of Wisconsin and Minnesota extended through the water between the [said] unsurveyed island and the main land on the Minnesota side, by reason of the fact that at that particular place the said sinuous course of deepest water lay between said island and said shore.

22. That the said improvement as aforesaid by the government was made during the years 1899 and 1902 inclusive.

23. That when said work was begun the defendant Andrew J. Tallas had a small house or cabin upon a portion of said island, which was thereafter burned, said cabin having stood on posts near the northerly point or shore thereof. That he thereafter constructed another small house or cabin, now existing thereon, some distance further in upon said island. That at the time of the commencement of this action and at the time of the trial thereof, the said Tallas was in possession of such portion of said island as was occupied by him, claiming to own the same by virtue of his continued possession thereof.

24. That the defendant Whiteside and the defendant Alexander, whose rights by stipulation were to be determined upon the evidence and upon the determination of the claims of said Whiteside, claim that because the original course of deepest water was between the said unsurveyed island and the main land of the Minnesota shore,



that the state boundary line between the states of Minnesota and Wisconsin therefore followed the same, and that said unsurveyed island which had arisen upon the bed as hereinbefore found, was therefore within the boundaries of the State of Wisconsin and that the rights of said Whiteside and Alexander as the owners of the lands upon Big Island, hereinbefore described, attached thereto, and claim the right to intervene by their ownership and at will by their occupancy of said unsurveyed island and of [sic] much of the submerged lands, between the said main land of the Minnesota shore and the improved navigable channel of deep water as lies between said unsurveyed island and the original sinuous course of deepest water and that such claims work a cloud upon the title of the plaintiff to the lands abutting upon said waters hereinbefore described and the rights and privileges incident thereto, and if persisted in would operate to deprive the plaintiff of one of the chief benefits and enjoyments of his said lands, and one of the chief elements of value thereof.

25. It is considered and adjudged by the court that said claims of the said defendants Whiteside and Alexander are unfounded and that their rights as the owners of the lands in the State of Wisconsin hereinbefore described and of any rights incident or attaching thereto, do not extend beyond the said navigable and navigated channel between the banks and shores and between said dock lines as improved by the government, and that they have no right whatever to interpose any obstruction to the plaintiff's full enjoyment of his said lands on the Minnesota shore and of the riparian rights and privileges incident thereto, including his right of access immediately in front thereof, to reach out to the said improved navigable and navigated channel between said dock lines and over and across the made land resulting from the deposit of said dredging material, and that the plaintiff's rights are not abridged so as to prevent such [excess-] and exclusive right and enjoyment, by reason of the [existence] of the interstate boundary in the bed of said waters, and it is considered and adjudged by the court that such interstate boundary is not an inflexible one, but that the same follows through the improved channel made by the federal government by authority of Congress, between said banks and shores and between said dock lines, in the improvement of said navigable channel and in the aid of commerce and navigation.

26. It is adjudged, determined and decree that the plaintiff is the owner in fee simple, absolute of the premises hereinbefore and in the bill of complaint described as belonging to him, together with all the riparian rights and privileges incident thereto and that such riparian rights and privileges include the right of access and wharfage and to make other improvements in front of his property to reach out to the navigable and navigated channel as improved by the government between said dock lines, and includes the exclusive right of occupancy and control, subject to the paramount power of the government and subject to the rights of the public of all of the intervening lands and lands covered with water between said dock line and the original shore line of the plaintiff's said property, free, clear and discharged of any claim or right



on the part of the defendants Whiteside and Alexander, or either of them, and that neither the defendant Whiteside or defendant Alexander, or either of them, have any right, title, interest or control or privileges whatsoever over the lands and premises or lands covered with water lying between the original shore of plaintiff's said lands and the said established dock line on the northerly side of said improved channel.

27. That the defendant Tallas, being in physical possession of said unsurveyed island, or some portion thereof, it is considered and adjudged by the court that by reason of that fact this court has not jurisdiction in this action in equity to determine the rights of said defendant Tallas, but that resort must be had to an action at law to determine the same, and this action is therefore dismissed as to said defendant Tallas without prejudice to the plaintiff to have recourse to a court of law to determine the same.

The plaintiff will be entitled to a copy of this decree as a muniment of title upon the payment by him to the clerk of his fees for a certified copy.

The defendants, Whiteside and Alexander will pay all of the costs of the cause for which an execution will issue.

An exception is allowed to plaintiff to paragraph 27, and to defendants Whiteside and Alexander to paragraphs 25 and 26, of this decree.

Let this decree be entered accordingly.

Dated June 14th, 1911.

By the Court,

PAGE MORRIS, *Judge.*

*(Petition of Robert B. Whiteside for Appeal and Order Allowing Same.)*

The above named defendant, Robert B. Whiteside, conceiving himself aggrieved by the decree entered in said court on the 14th day of July, 1911, in the above entitled cause, does hereby  
167 appeal from the said decree to the United States Circuit Court of Appeals for the Eighth Circuit; and he prays that his said appeal may be allowed and that a transcript of the records, proceedings and papers upon which said decree was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated Dec. 21, A. D. 1911.

ALFRED JAKUES,  
THEO. T. HUDSON,  
L. C. HARRIS,

*Solicitors for Appellant Robert B. Whiteside.*

And now, to-wit; on the 21st day of Dec., A. D. 1911, it is ordered that said appeal be allowed as prayed for.

PAGE MORRIS,  
*District Judge, Presiding as Circuit Judge.*

Filed in the Circuit Court on Dec. 21, 1911.



*Assignment of Errors on Appeal of Robert B. Whiteside.*

Comes now the above named defendant, Robert B. Whiteside and makes the following Assignment of Errors, which he avers occurred in the trial of said cause in the Circuit Court, and prays for reversal of the decree rendered by said Circuit Court on the 14th day of July, A. D. 1911, and for the dismissal of the Bill of Complaint, to-wit:

The said Circuit Court erred:

1. In failing to dismiss the Bill of Complaint.
2. In entering a decree in favor of the complainant for the relief prayed for in the bill.
3. In failing to render a decree for the defendant, Robert B. Whiteside, for the relief prayed for in his said answer.
4. In holding and deciding that the court had jurisdiction over the subject matter of the action, referred to in the complaint.
5. In holding and deciding that the boundary line between the States of Minnesota and Wisconsin, at the locus in quo, was the middle of the artificial channel dredged out by the General Government, as shown by Plaintiff's Exhibit 9.
- 168 6. In failing to hold and decide that the boundary line between the states of Minnesota and Wisconsin, at the locus in quo, was the middle of the main channel of the said St. Louis River, as shown by Plaintiff's Exhibit 9.
7. In holding and deciding that the War Department could, by dredging an artificial channel, at the locus in quo, several hundred feet south of the middle of the main channel of the said St. Louis River, shift the boundary line between said states from the middle of the main channel of said river to the middle of said artificial channel.
8. In failing to hold and decide that the War Department of the General Government was without authority to shift the boundary line between the States of Minnesota and Wisconsin, at the locus in quo, by dredging out an artificial channel several hundred feet south of the middle of the main channel of the said St. Louis River.
9. In holding and deciding that the complainant's riparian rights entitled him to fill in and wharf out over the main channel of the said St. Louis River, immediately in front of his said premises as shown on Plaintiff's Exhibit 9.
10. In failing to hold and decide that complainant's riparian rights did not give him the right to fill in and wharf out over the main channel of the said St. Louis River, and immediately in front of his said premises.
11. In holding and deciding that complainant's riparian rights entitled him to fill in and wharf out, immediately in front of his said premises, to the said artificial channel dredged out by the Government, as shown on Plaintiff's Exhibit 9.
12. In failing to hold and decide that complainant's riparian rights did not entitle him to fill in and wharf out, immediately in



front of his said premises, to the said artificial channel dredged out by the government.

13. In holding and deciding that, under the laws of the State of Wisconsin, the title in fee to the bed of the said St. Louis River, immediately in front of Big Island, referred to in the bill, and as shown on Plaintiff's Exhibit 9, was not in the defendant, Robert B. Whiteside.

14. In failing to hold and decide that, under the laws of the State of Wisconsin, the title in fee to the so called Tallas Island, referred to in the bill and shown on Plaintiff's Exhibit 9, was in the defendant, Robert B. Whiteside, at a time long prior to the time when the said artificial channel was dredged out by the government.

169 15. In holding and deciding that the War Department had authority to divest the defendant, Robert B. Whiteside, of his title in fee to the so called Tallas Island, by dredging out an artificial channel south of said Tallas island, after the title to said island had fully vested in said defendant Robert B. Whiteside.

16. In holding and deciding that neither the Defendant, Whiteside, or any other person, could acquire private ownership or control over the said Tallas island, and that said island, since its formation as a permanent island, is subject to the paramount control of the Government, in the same way and manner as the subaqueous lands in the bed of said St. Louis River.

17. In holding and deciding that the complainant is deprived of access to the said improved artificial channel, dredged out by the Government.

18. In holding and deciding that the riparian rights of the so called Big Island, owned by the defendant, Whiteside, and described in the bill, do not and cannot extend beyond the southerly side of the said improved artificial channel, dredged out by the Government, and shown on Plaintiff's Exhibit 9.

19. In holding and deciding that the said so called Tallas island was an obstruction to plaintiff's enjoyment of his natural riparian rights.

20. In holding and deciding that the old, original channel of the said St. Louis River, immediately in front of plaintiff's said premises, was to some extent, unknown, shallower than formerly.

21. In holding and deciding that said old, main channel of the said St. Louis River, immediately in front of plaintiff's said premises, would be gradually lessened in depth.

Wherefore, said defendant, Robert B. Whiteside, prays that said decree of the said Circuit Court be reversed, and said Circuit Court be directed to enter a decree in said cause dismissing the bill of complaint as prayed for in the answer of the said defendant, Robert B. Whiteside.

ALFRED JAQUES,  
THEO. T. HUDSON, &  
L. C. HARRIS,

*Solicitors for Defendant Robert B. Whiteside.*

Endorsed: Filed in the Circuit Court on Dec. 21, 1911.



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*(Bond on Appeal of Robert B. Whiteside.)*

Know All Men By These Presents, that we, Robert B. Whiteside as principal and Alfred Jaques and L. C. Harris as sureties are held and firmly bound unto the complainant, George W. Norton, as Executor and Trustee of the Estate of George W. Norton, deceased in the full and just sum of One Thousand (\$1,000.00) Dollars, lawful money of the United States, to be paid to the said complainant his certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Signed with [out] seals and dated this 21st day of December A. D. 1911.

The conditions of this bond are such that, whereas, lately, at Circuit Court of the United States, for the District of Minnesota, Fifth Division, in equity, in a suit pending therein between George W. Norton, as Executor and Trustee of the Estate of George W. Norton, Deceased, complainant, and Robert B. Whiteside, E. F. Alexander and Andrew J. Tallas, defendants, a decree was entered on the 14th day of July, A. D. 1911, in favor of said complainant Norton and against said defendant, Whiteside; and, whereas said defendant, Whiteside, has sued out and obtained an appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit and filed a copy thereof in the clerk's office of said court, to reverse said decree in said suit, and has caused to be issued a citation, directed to the said complainant, Norton, citing him to be and appear in said court, in said cause, within sixty days from the date of said citation.

Now, Therefore, if the said defendant, Robert B. Whiteside shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make his said plea good, then the above bond to be void; otherwise to remain in full force and effect.

[SEAL.]

ROBERT B. WHITESIDE.

[SEAL.]

ALFRED JAKUES.

[SEAL.]

L. C. HARRIS.

In Presence of

M. L. KNUTSON.

T. T. HUDSON.

STATE OF MINNESOTA,  
County of St. Louis, ss:

On this 21 day of December, A. D. 1911, before me a notary public within and for said county, personally appeared Robert B. Whiteside, Alfred Jaques and L. C. Harris, to me well known to be the persons who are described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same freely and voluntarily.

[NOTARIAL SEAL.]

T. T. HUDSON,

Notary Public, St. Louis Co., Minn.

My Commission expires April 20th, 1914.



STATE OF MINNESOTA,  
*County of St. Louis, ss:*

Alfred Jaques and L. C. Harris being duly sworn, each for himself deposes and says, that he is a freeholder in the State of Minnesota, and that he is worth the sum of Two Thousand — (\$2,000.00) over and above his debts and liabilities and the exemptions allowed by law.

ALFRED JAKUES.  
L. C. HARRIS.

Subscribed and sworn to before me this 21st day of December, A. D. 1911.

[NOTARIAL SEAL.]

T. T. HUDSON,  
*Notary Public, St. Louis Co., Minn.*

My Commission expires April 20th, 1914.

The foregoing bond is hereby approved this 21st day of Dec., A. D. 1911.

PAGE MORRIS, *Judge.*

Endorsed: Filed in the Circuit Court on Dec. 21, 1911.

*Citation.*

United States of America, Circuit Court, Eighth Circuit.

United States of America to George W. Norton as Executor and Trustee of the Estate of George W. Norton, deceased, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States, district of Minnesota, 5th division wherein Robert B. Whiteside is Appellant and 172 you are Appellee to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Page Morris, Judge of the U. S. District Court this 21st day of December, A. D. 1911.

PAGE MORRIS,  
*Judge of District Court, Presiding as Circuit Judge.*

Due Service of the foregoing Citation by Copy at Duluth, Minnesota is hereby admitted this 26th day of December, 1911.

WASHBURN, BAILEY & MITCHELL,  
*Att'ys and Solicitors for Plaintiff.*

Filed in the Circuit Court on Dec. 26, 1911.



*(Election to Have Record Printed in Circuit Court of Appeals)*

Appellant in the foregoing entitled action hereby gives notice of his election to take an appeal in the appellate court and transcription of the record on Appeal to be printed under the supervision of the clerk under its rules.

Dated December 26, 1911.

ALFRED JAQUES,  
THEO. T. HUDSON,  
L. C. HARRIS,  
*Attorneys for Appellant.*

Filed in the Circuit Court on Dec. 26, 1911.

*(Petition of Norton, Executor, etc., for Appeal and Order Allowing Same.)*

The above named plaintiff, George W. Norton as Executor and Trustee of the Estate of George W. Norton, Deceased, conceiving himself aggrieved by that part of said decree entered in the said court on the 14th day of July, 1911, in the above entitled cause wherein and whereby it was adjudged and decreed that the court had not jurisdiction in this action to determine the rights of the said defendant Tallas, and that resort must be had to an action at law to determine the same, and wherein this action was dismissed as to the said defendant Tallas, does hereby appeal from that part of said decree to the United States Circuit Court of Appeals for the

173 Eighth Circuit, and prays that his said appeal may be allowed and that a transcript of the records, proceedings and papers upon which said decree was entered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Eighth Circuit.

Dated, January 4, 1912.

JED L. WASHBURN,  
WILLIAM D. BAILEY,  
OSCAR MITCHELL,  
*Solicitors and of Counsel for Appellant George W. Norton as Executor and Trustee of the Estate of George W. Norton, Deceased.*

And now, to-wit on the 4th day of January, A. D. 1912, it is ordered that said appeal be allowed as prayed for.

PAGE MORRIS,  
*Judge of the United States District Court,  
District of Minnesota, Presiding as Circuit Judge.*

Personal service admitted Jan. 4, 1912.

D. G. CASH & J. B. RICHARDS,  
*Solicitors for Def't Tallas.*

Filed in the District Court on Jan. 4, 1912.



*(Assignment of Errors on Appeal of Norton, Executor, etc.)*

Now comes the above named plaintiff, George W. Norton as Executor and Trustee of the estate of George W. Norton, Deceased, and makes the following assignment of errors which he avers occurred in the trial of the said cause in the Circuit Court, and prays for a reversal of the decree in said cause rendered by said Circuit Court on the 14th day of July, 1911, in so far as the same adjudged the court to be without jurisdiction to determine the rights of the defendant Tallas and that resort must be had to an action at law to determine the same, and in so far as the same decreed the dismissal of said action in equity as to the said defendant Tallas, and prays that the rights of said Plaintiff as against the said defendant Tallas be adjudicated and determined upon the record of said cause, and that it be adjudicated and determined that the plaintiff is entitled to the relief sought and prayed for in the Bill of Complaint herein, against the said defendant Tallas.

The said court erred,

1. In holding and decreeing that it had not jurisdiction in this action in equity to determine the rights of the said defendant Tallas, but that resort must be had to an action at law to determine the same.

174 2. In decreeing that this action is dismissed as to the said defendant Tallas.

3. In failing to render a decree in favor of the plaintiff and against the defendant Tallas in said cause for the relief prayed for in the bill of complaint therein, which the record in said cause showed the plaintiff entitled to, and in failing to hold that the court had jurisdiction of the parties and of the subject matter of the action, and therefore had full power and authority to determine the said cause as to all of the parties thereto.

4. In failing to hold that the said defendant Tallas, having answered to the merits of said cause and having participated in the taking of testimony therein, and having raised no question as to the jurisdiction of the court to determine the rights of the said Tallas in said cause until after the report of the Special Master and the making up of the record and until after argument thereon, [and] the said defendant Tallas had waived any right to object to the jurisdiction of the court of equity to determine the said cause as to him, and that his objection thereto came too late.

Wherefore, said plaintiff, George W. Norton, as Executor and Trustee of the Estate of George W. Norton, Deceased, prays that the said decree of the said Circuit Court as to the said defendant Tallas be reversed and that said Circuit Court be directed to enter a decree in said cause in favor of the plaintiff and against the said defendant Tallas for the relief prayed for in the plaintiff's bill of complaint.

Dated, January fourth, 1912.

JED L. WASHBURN,  
WILLIAM D. BAILEY,  
OSCAR MITCHELL,

*Solicitors and of Counsel for the Plaintiff*  
*George W. Norton as Executor, &c.*

Filed in the District Court on Jan. 4, 1912.



*(Bond on Appeal of Norton, Executor, etc.)*

Know All Men by These Presents, That we, George W. Norton principal and J. L. Washburn and W. D. Bailey as sureties, are hereby and firmly bound unto the defendant Andrew J. Tallas in the full sum of One Thousand Dollars, lawful money of the United States to be paid to the said defendant Tallas, his certain attorneys, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

175 Sealed with our seals and dated this fourth day of January 1912.

The conditions of this bond are such that, whereas, lately at Circuit Court of the United States, for the District of Minnesota Fifth Division, in equity, in a suit pending therein between George W. Norton as Executor and Trustee of the Estate of George W. Norton, Deceased, Complainant, and Robert B. Whiteside, E. Alexander and Andrew J. Tallas, Defendants, a decree was entered on the 14th day of July, 1911, in favor of the said defendant Tallas and against the said complainant, wherein and by which the said action as to the said defendant Tallas was dismissed; And,

Whereas the said complainant has sued out and obtained an appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit and filed a copy thereof in the office of the Clerk of said Court, to reverse said decree in said suit, and has caused to be issued a citation directed to the said defendant Tallas citing him to be and appear in said court, in said cause, within sixty days from the date of said citation.

Now Therefore, if the said complainant shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make his said plea good, then the above bond to be void; otherwise to remain in full force and effect.

[SEAL.]

GEORGE W. NORTON,  
By J. L. WASHBURN,  
*His Att'y.*

[SEAL.]

J. L. WASHBURN.  
W. D. BAILEY.

[SEAL.]

In Presence of

C. M. VAN NORMAN.  
F. M. EMANUELSON.

STATE OF MINNESOTA,  
County of St. Louis, ss:

On this 4th day of January, 1912, before me a Notary Public within and for said county personally appeared J. L. Washburn and W. D. Bailey, to me well known to be the persons described and who executed the foregoing instrument, and they several acknowledged to me that they executed the same freely and volu



176 tarily; and the said Washburn acknowledged that he executed the same freely and voluntarily in behalf of said George W. Norton, as one of his attorneys and solicitors.

[NOTARIAL SEAL.]

C. M. VAN NORMAN,

*Notary Public, St. Louis Co., Minn.*

My Commission expires Nov. 12, 1915.

STATE OF MINNESOTA,

*County of St. Louis, ss:*

J. L. Washburn and W. D. Bailey, being duly sworn, each for himself deposes and says, that he is a freeholder in the State of Minnesota, that he is worth the sum of Two Thousand Dollars over and above his debts and liabilities and the exemptions allowed by law.

J. L. WASHBURN.

W. D. BAILEY.

Subscribed and sworn to before me this fourth day of January 1912.

[NOTARIAL SEAL.]

C. M. VAN NORMAN,

*Notary Public, St. Louis Co., Minn.*

My Commission expires Nov. 12, 1915.

The foregoing bond is hereby approved this 4th day of January 1912.

PAGE MORRIS, *Judge.*

Endorsed: Bond on Appeal by Complainant. Personal service admitted Jan'y 4, 1912. D. G. Cash and J. B. Richards, solicitors for def'ts. Filed January 4, 1912. Charles L. Spencer, Clerk. By Thos. H. Pressnell, Deputy Clerk.

*Citation.*

UNITED STATES OF AMERICA:

Circuit (now District) Court, Eighth Circuit.

United States of America to Andrew J. Tallas, Greeting:

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States, District of Minnesota, Fifth Division, wherein George W. Norton as Executor and Trustee of the estate of George W. Norton, Deceased is appellant and you, said

177 Andrew J. Tallas are appellee, to show cause, if any there be, why the decree entered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.



Witness the Honorable Page Morris, Judge of the United States District Court, this fourth day of January, 1912.

PAGE MORRIS,  
*Judge of the U. S. District Court,  
Presiding as Circuit Judge.*

Personal service of the foregoing citation, by copy, at Duluth Minnesota, is hereby admitted this 4th day of January, 1912.

D. G. CASH &  
J. B. RICHARDS.

Filed in the District Court on Jan. 4, 1912.

*(Stipulation as to Record on Appeal.)*

On Appeal to the Circuit Court of Appeals of the United States,  
Eighth Circuit.

Whereas, an appeal has been taken by the defendant Robert B. Whiteside from the decree of the Circuit Court of the United States for the District of Minnesota, Fifth Division, entered in said cause, and an appeal has been taken by the Plaintiff George W. Norton as Executor and Trustee of the Estate of George W. Norton, Deceased, from that portion of said decree which dismissed the action as to the defendant Andrew J. Tallas;

Therefore, It is stipulated between the parties hereto that only one record shall be sent up, and that the cost of such transcript and record shall be borne by the respective parties, to-wit, the plaintiff and defendant Whiteside in proportions hereafter to be agreed to between themselves.

Dated and signed this 10th day of Jan'y, 1912.

WASHBURN, BAILEY & MITCHELL,  
*Attorneys and Solicitors for Plaintiff.*

ALFRED JAQUES,  
THEO. T. HUDSON, AND  
L. C. HARRIS,  
*Attorneys and Solicitors for Defendant Whiteside.*

D. G. CASH &  
J. B. RICHARDS,  
*Attorneys and Solicitors for Defendant Andrew J. Tallas.*

Filed in the District Court on Jan. 11, 1912.

UNITED STATES OF AMERICA,  
*District of Minnesota, ss:*

I, Charles L. Spencer, Clerk of said Court, do hereby certify and return to the Honorable the United States Circuit Court of Appeals



for the Eighth Circuit, that the foregoing containing 308 pages, numbered consecutively from 1 to 308 inclusive, is a true and complete transcript of the record, pleadings, process, orders and final decree, and all other proceedings in a cause numbered 732 and entitled George W. Norton, as Executor and Trustee of the Estate of George W. Norton, deceased, complainant vs. Robert B. Whiteside, E. P. Alexander and Andrew J. Tallas, defendants; and I do further certify and return that I have annexed to said transcript and included within said paging the opinion of the Court and the original appeals and original citations, with proof of service thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Duluth in said District and Division, this 2nd day of May, A. D. 1912.

[Seal U. S. District Court, Fifth Division, District of Minnesota.]

CHARLES L. SPENCER, *Clerk*,  
By THOS. H. PRESSNELL, *Deputy*.

No. 3780, Filed May 4, 1912. John D. Jordan, Clerk.

No. 3787, Filed May 20, 1912. John D. Jordan, Clerk.

179 (*Appearance of Counsel for Appellee in Cause No. 3780.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 3780.

GEORGE W. NORTON, as Executor and Trustee of the Estate of  
George W. Norton, Deceased, Complainant and Appellee,

vs.

ROBERT B. WHITESIDE et al., Defendants; ROBERT B. WHITESIDE,  
Appellant.

To Clerk of the above named Court:

Please enter our appearance as solicitors for George W. Norton, Executor and Trustee of the Estate of George W. Norton, Deceased, appellee in the above entitled appeal.

Dated January 12th, 1912.

J. L. WASHBURN,  
W. D. BAILEY,  
OSCAR MITCHELL,  
*Solicitors for Appellee.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 6, 1912.



*(Appearance of Counsel for Appellant in Cause No. 3780.)*

United States Circuit Court of Appeals, Eighth Circuit.

No. 3780.

ROBERT B. WHITESIDE, Appellant,

VS.

GEORGE W. NORTON, as Executor and Trustee of the Estate of  
George W. Norton, Deceased.

The Clerk will enter my appearance as Counsel for the Appellant.

ALFRED JAKUES.

THEODORE T. HUDSON.

LUTHER C. HARRIS.

Duluth, Minn.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 8,  
1912.

180 *(Order of Argument in Cause No. 3780.)*

December Term, 1912.

MONDAY, December 9, 1912.

This cause having been called for hearing in its regular order, argument was commenced by Mr. L. C. Harris for appellant and continued by Mr. J. L. Washburn for appellee, and the hour for adjournment having arrived further argument is postponed until tomorrow.

*(Order of Submission in Cause No. 3780.)*

December Term, 1912.

TUESDAY, December 10, 1912.

This cause having been called for further hearing, argument was continued by Mr. Alfred Jaques for appellant and concluded by Mr. L. C. Harris for the appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.



*(Appearance of Counsel for Appellant in Cause No. 3787.)*

United States Circuit Court of Appeals, Eighth Circuit.

No. 3787.

GEORGE W. NORTON, as Executor and Trustee of the Estate of  
George W. Norton, Deceased, Appellant,

vs.

ANDREW J. TALLAS.

The Clerk will enter my appearance as Counsel for the Appellant.

J. L. WASHBURN.

W. D. BAILEY.

OSCAR MITCHELL.

Duluth, Minnesota.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 20,  
1912.

181 *(Appearance of Mr. John B. Richards, Jr., as Counsel for  
the Appellee, in Cause No. 3787.)*

The Clerk will enter my appearance as Counsel for the Appellee.

JOHN B. RICHARDS, JR.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 20,  
1912.

*(Appearance of Mr. D. G. Cash, as Counsel for the Appellee, in  
Cause No. 3787.)*

The Clerk will enter my appearance as Counsel for the Appellee.

D. B. CASH.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 21,  
1912.

*(Order of Argument in Cause No. 3787.)*

December Term, 1912.

MONDAY, December 9, 1912.

This cause having been called for hearing in its regular order,  
argument was commenced by Mr. J. L. Washburn for appellant  
and continued by Mr. John B. Richards for appellee and the hour  
for adjournment having arrived further argument is postponed  
until tomorrow.



(*Order of Submission in Cause No. 3787.*)

December Term, 1912.

TUESDAY, December 10, 1912.

This cause having been called for further hearing, argument was continued by Mr. John B. Richards for Appellee and concluded by Mr. J. L. Washburn for appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

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(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1912.

Nos. 3780 and 3787.

ROBERT B. WHITESIDE, Appellant,

vs.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellee.

Appeal from the Circuit Court of the United States for the District of Minnesota.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellant,

vs.

ANDREW J. TALLAS, Appellee.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. Luther C. Harris and Mr. Alfred Jaques (Mr. Theodore T. Hudson was with them on the brief), for appellant Whiteside.

Mr. Jed L. Washburn (Mr. William D. Bailey, Mr. Oscar Mitchell and Mr. Albert C. Gillette were with him on the brief), for George W. Norton, appellee and appellant.

Mr. John B. Richards, Jr., (Mr. Daniel G. Cash was with him on the brief), for appellee Tallas.

Before Hook and Smith, Circuit Judges, and Van Valkenburgh District Judge.

Van Valkenburgh, District Judge, delivered the opinion of the Court.

This is a suit in equity brought by George W. Norton, as Executor and Trustee, complainant below, against Robert B. Whiteside, E. P.



Alexander and Andrew J. Tallas as defendants. For clearness and convenience the terms complainant and defendant will be used in this opinion.

183 The St. Louis River flows into the western end of Lake Superior; at its mouth it widens into an estuary presenting more than one channel and broad expanses of water, all finally flowing into the lake proper through a natural entry between two points of land called, respectively, Minnesota Point and Wisconsin Point. One of these broader expanses, nearest the main body of the lake, is called "Superior Bay"; another to the westward "St. Louis Bay"; and a third still farther west "Pokegama Bay." As might be supposed, this estuary contains islands of greater and less size and prominence. The City of Duluth, Minnesota, with its environments, is situated upon the north shore of these waters, and the City of Superior upon the southern or Wisconsin shore.

The St. Louis River for some distance from its mouth forms the boundary line between the States of Minnesota and Wisconsin. The enabling act, for the admission of the State of Wisconsin, described its boundary as running "through the center of Lake Superior to the mouth of the St. Louis River, thence up the main channel of said river to the first rapids in the same above the Indian village, according to Nicollet's map." The later enabling act, for the State of Minnesota, used terms more general, but consistent with the former description. The complainant, Norton, has for many years past been the owner of certain lands located on the northerly or Minnesota shore of these waters, about eight or ten miles above the points forming the natural entry, to which reference has been made. The defendant Whiteside, and his predecessors in title, have for many years been the owners of an island known as "Big Island," lying south of the lands of Norton, and conceded to be in the State of Wisconsin. The distance between Big Island and the Norton lands is about two thousand feet. Sometime after the survey of Big Island there began to form in the waters between the lands of Norton and Whiteside a smaller island, which has since become a distinct body of land, and which forms the subject-matter of this controversy. At that time, and at all times prior to 1899, and, perhaps, until 1902, the main natural channel at this point ran within a few hundred feet of the Minnesota shore, in front of the Norton lands, and north of the small island thus formed between the lands of Norton and Whiteside. This island was claimed by Whiteside as appurtenant to his holding. Several years prior to the commencement of this action the defendant Tallas settled on the small island, which for convenience will be called the "Tallas Island." He built a cabin on it and claims title thereto by adverse possession. Later, in the Superior Court of Douglas County, Wisconsin, the defendant Whiteside brought suit in ejectment against Tallas, which suit was still pending when the present action was instituted.

In the exercise of its power to improve navigation in the interest of commerce the government of the United States dredged an artificial channel through these waters, whereby the navigable channel was established south of the Tallas Island, and several hundred feet



184 south of the former main natural channel, which ran north of that island. This work was begun in 1899 and completed in 1902. January 27, 1910, complainant filed his bill in the Circuit Court of the United States for the District of Minnesota, at Duluth, charging that, by reason of this change of channel, the cabin of the defendant Tallas intervened between said improved navigable and navigated channel and the shore of complainant's lands, and, therefore, was infringing upon the riparian rights and privileges of complainant incident and appurtenant to his said lands and estate; that the defendants Whiteside and Alexander also claimed some rights in and to this island as incidental to their ownership of Big Island; that none of defendants, however, had any right, title or interest in said small island save only such riparian rights in the defendants Whiteside and Alexander as might be incident or appurtenant to their other lands; that the occupancy of the defendant Tallas, and the claims of all the defendants worked a cloud upon the complainant's title and estate. Complainant prayed that it be adjudged and decreed that he is the owner in fee simple of his lands upon the Minnesota shore; that the riparian rights and privileges incident thereto, and exclusively thereto belonging, be adjudged and decreed to extend out to the navigable and navigated channel established by the government, as aforesaid, free, clear, and discharged of any claims on the part of the defendants; that it be adjudged, determined and decreed that neither the defendants, nor any of them, have any right, title or interest whatsoever in or to the said small island or any lands appearing above the surface of the water lying or being between said improved channel and the shore of complainant's land; that said defendants be restrained from interfering with or impairing the full enjoyment by complainant of the riparian rights and privileges thus claimed by him to be incident to the ownership of his lands on the Minnesota shore, including the full rights of access, wharfage or other improvements which he might see fit to make to reach out to the said navigable and navigated channel. The defendant Alexander was made a party as the owner of a small parcel of the land composing Big Island. It was stipulated that his interest should be determined by the decision as to the defendant Whiteside, and for that reason, he does not appear in these appeals. So far as shown by the record, the defendant Tallas is the only party in actual possession of the island in controversy. The trial Court found the issues in favor of the complainant against the defendant Whiteside, but dismissed the suit as to the defendant Tallas, upon the ground that complainant's proper remedy was ejectment. The defendant Whiteside appeals from the decree entered against him, and the complainant appeals from that dismissing the suit against Tallas.

The defendant Whiteside contends that the Circuit Court was without jurisdiction, for the reason that the land in controversy is in the State and district of Wisconsin, and, therefore, beyond the jurisdiction of the federal court sitting in Minnesota. The complainant denies this, contending that the waters flowing between complainant's and defendants' land are not the St. Louis River, but an arm of Lake Superior. Therefore, that

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the terms of the enabling act fixing the boundary line in the middle of the main channel has no application; also, that even though this be the St. Louis River, nevertheless the dredging of the artificial channel by the government operated, in law, to shift the boundary line between the states; that consequently the premises forming the subject-matter of the action are located in Minnesota. The defendant Whiteside maintains that this is the St. Louis River and not an arm of the lake; and that in either event, the middle of the main channel is the boundary line. The defendant Whiteside further claims that the title to the bed of the stream, to the center of the main natural channel, and, therefore, to all islands formed thereon, vested in him by virtue of his ownership of Big Island, and that such title cannot be divested by such artificial and arbitrary processes. This is denied by complainant, who asserts that the shore owner takes no title to the bed of a stream, but that such title vests in the states in their sovereign capacity; that all such titles are subject to the paramount right of the government to improve navigation, even to the extent of changing the boundaries between states, by altering the location of the navigable channel; that complainant's right of access, as a riparian owner, entitles him to extend not only to the natural navigable channel, but to an established navigated channel in front of his lands.

We are of opinion, that the body of water at the locus in quo is a part of the St. Louis River—a navigable river, as understood in the law. The reasons leading to this conclusion are several:

(a) The enabling act admitting the State of Wisconsin, and defining its boundaries, thus provided: "thence down the main channel of the Montreal River to the middle of Lake Superior, thence through the middle of Lake Superior to the mouth of the St. Louis River, thence up the main channel of said river to the first rapids in the same above the Indian village, according to Nicollet's map." It is conceded that the St. Louis River flows into Lake Superior at some point. That point is its mouth, and was so well defined to the legislative eye that it was referred to as a natural monument in describing the boundary of the new State. From the exhibits presented, the entry between Minnesota point and Wisconsin point conforms most logically to this description. There the lake proper has its beginning. It is disclosed in the testimony that through what is called St. Louis Bay the surveys show portions of a channel, at times partially lost, but re-appearing through Superior Bay, and continuing with a marked current through the entry and for a considerable distance into the lake. If, however, we eliminate the broader expanses of St. Louis Bay and Superior Bay, still the narrows at Grassy Point would constitute the innermost opening to which the term "mouth of a river" could be applied with any degree of appropriateness, and this is far lakeward from the island in controversy. The

witness Darling, government engineer engaged in this harbor improvement, and called on behalf of complainant, testified that above Grassy Point there is a well defined channel with the characteristics of a river; and such, he pronounced these waters to be.

(b) On Nicolett's map, especially referred to and recognized in



this act, the St. Louis River is drawn and indicated as a river down to the lake proper, and far below the wider portion now known as "Pokegama Bay," and on this map as "Pakegomag." This bay lies south of Big Island, and, therefore directly opposite the island and other lands under discussion.

(c) The trial Court, upon the facts and with an intimate personal knowledge of the locality, so held, and great weight should be given to this finding of the chancellor.

If this then be the St. Louis River, not only is the boundary between Wisconsin and Minnesota declared by legislative enactment to be the middle of its main channel,—as that channel then existed—but the doctrine of the "thalweg," meaning the middle, or deepest, or most navigable channel, is applicable in determining the line of boundary between the two states. (*Louisiana v. Mississippi*, 202 U. S. 1.) And there the boundary remains, subject to the changes which come to it by the slow and imperceptible processes of erosion and accretion. (*Washington v. Oregon*, 211 U. S. 127.) The rule of accretions and avulsions, as determining boundaries, applies equally to public and private rights. (*Missouri v. Nebraska*, 196 U. S. 23.) In the latter case the condition produced by avulsion had existed from 1867 to 1904. Nevertheless, the land theretofore belonging to Nebraska, which had by avulsion been placed on the Missouri side of the river, was held still to be Nebraska land. The Supreme Court said:

"Where a stream which is a boundary, from any cause, suddenly abandons its old and seeks a new channel such change of channel works no change of boundary, and the boundary remains as it was, in the center of the old channel, although no water may be flowing therein."

It was further held, as in *Washington v. Oregon*, *supra*, that Congress, without consent, has no power to change the boundary between states. Still less, does such power exist in an administrative department. Under the conditions here present the doctrine of the thalweg would apply in any event, whether these waters be viewed as those of a river, or as an arm of the lake. In *Louisiana v. Mississippi*, *supra*, the Supreme Court said:

"We are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea.

"As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States; but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies."

This doctrine was applied in the San Juan water boundary controversy between the United States and Great Britain, and in the Alaskan boundary cases; and in fixing the boundary line of the Detroit River, which is a mere strait in the chain of Great Lakes, the deep water channel was adopted giving Belle Isle to the United States, as lying north of that channel. So, that rule unquestionably applies here. Such channel was that existing at the time the



boundary was established. The act itself says: "Up the main channel of said river." This term now has, in law, a very definite meaning. Prior to the improvement made by the government, the channel answering to this description ran on the north side of the Tallas island. This sufficiency appears from the testimony, is found as a fact by the trial Court, and is practically assumed by counsel on both sides in brief and argument. If this be conceded, then this island was, as the Court below said, prior to the cutting of this artificial channel, in the State of Wisconsin; if so, it could not be appurtenant to the lands of complainant. Under what we conceive to be a complete harmony of decision in Wisconsin it was appurtenant to Big Island, and the title thereto was in the owner of the latter island, unless divested by conveyance, by condemnation, or by possession amounting to superior right.

How then has this title been affected by cutting the artificial channel along the south side of the Tallas island? Did this act change the boundary between Minnesota and Wisconsin, and divest Whiteside of whatever rights had accrued to him by virtue of his original riparian ownership? Big Island is conceded to be in the State of Wisconsin.

"The question of the title of a riparian owner is one of local law, and unrestricted grants of the government, bounded on streams and other waters, are to be construed according to the law of the State in which the lands lie. (*Hardin v. Jordan*, 140 U. S. 371) \* \* \*

"Where the government has surveyed and patented the lands up to the bank of a channel in which an unsurveyed island is situated, a patentee of the land on such bank, although his land may itself be an island surrounded by two channels of the river, has all the rights of a riparian owner in the channel lying opposite his banks, including the unsurveyed island if, as a riparian owner, he is entitled thereto by the laws of the State." *Whitaker v. McBride*, 197 U. S. 510.

The latter case dealt with lands of Nebraska, but such is equally the law of Wisconsin. (*Chandos v. Mack*, 77 Wis. 573; *Walls v. Cunningham*, 123 Wis. 346; *Sliter v. Carpenter*, 123 Wis. 578; *Farris v. Bentley*, 141 Wis. 671; *Kelley v. Salvas*, 146 Wis. 543.) In *Hall, et al. v. Hobart*, (C. C. A.) 186 Fed. 426, this Court held, under the laws of Minnesota, conceded by the trial Court to be identical in this respect with those of Wisconsin, and in any view, 188 not more strongly, if so strongly, favorable to the contention of appellant Whiteside, that the riparian owners have possessory rights to the beds and to islands in navigable streams with the beneficial use or enjoyment thereof, subject only to use for purposes of navigation. Nor are the rights of riparian owners affected by the fact that the stream is a boundary. (*United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447.) The language of the Supreme Court in *St. Louis v. Rutz*, 138 U. S. 226, under the facts there existing, bears directly upon the questions here presented. It was there said:



"By the law of Illinois the title of the plaintiff extended to middle of the main channel of the Mississippi River.

"It is a rule of property in Illinois, that the fee of the riparian owner of lands in that state bordering on the Mississippi River extends to the middle line of the main channel of the river. \* \*

"The sudden and perceptible loss of land on the premises conveyed to the plaintiff, which was visible in its progress, did not deprive the grantor of the plaintiff of his fee in the submerged land, nor change the boundaries of the surveys on the river from as they existed when the land commenced to be washed away. \* \*

"If an island or dry land forms upon that part of the bed of the river which is owned in fee by the riparian proprietor, the same is his property. \* \* \*

"It is well settled that the owner in fee of the bed of a river, or other submerged land, is the owner of any bar, island or dry land which subsequently may be formed thereon. \* \* \*

"As the law of Illinois confers upon the owner of land in that State which is bounded by, or fronts on, the Mississippi River, the title in fee to the bed of the river to the middle thereof, or so far as the boundary of the state extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of the middle of its width. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the State of Missouri, to extend his ownership, by mere accretion, to land situated in the State of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that state.

"We must not be understood as implying, that if an island in the Mississippi River remains stable in position, while the main channel of the river changes from one side of the island to the other, the title to the island would change, because it might be one time on one side and at another time on the other side of the boundary between two states."

The Supreme Court of Wisconsin in *State v. Bowen*, 149 W. 203, restates the settled rules governing changes of boundary by erosion or accretion, and declares that states and individuals are subject alike to such losses and gains, but that neither can have the boundaries of his domain changed by avulsion nor by diversion of the water effected by human agencies. Under the conditions here presented the law of Wisconsin had already determined the right of ownership in this island before the improvement channel was established. In *Barney v. Keokuk*, 94 U. S. 338, the Supreme Court held that the beds and shores of navigable water properly belong to the states by their inherent sovereignty, and that the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water. There is no proprietary title to the bed of the stream, nor to any island that may subsequently be formed therein, exists in the government. See *Hardin v. Shedd*, 190 U. S. 508-519; *United States v. Chandler-Dunbar Company*, 209 U. S. 447-451; and the very recent case of *Scott v. Lattig, et al.*, decided by the Supreme Court February



3, 1913.) The Tallas island was formed after the admission of the States of Wisconsin and Minnesota, and subsequently to the survey and patent of the lands of Norton and Whiteside.

Applying the principles discussed to the case at bar, we find here in the St. Louis River an island, which was, prior to this arbitrary change of channel, in the State of Wisconsin, appurtenant to the land of Whiteside, to which his ownership had attached, and still adhered, unless divested by Tallas. The main channel, forming the boundary of the state, ran between this island and the Minnesota property of complainant; and the latter could have no interest in nor right to it. A human agency intervenes and in brief space of time, by acts clearly perceptible, establishes a new navigable channel on the opposite side of this island. Can private property rights thus be divested, and the boundaries between sovereign states changed? And even though state boundaries may be changed, can the title to private property be transferred in such manner? The complainant bases his claim upon the theory that the establishment of the middle line of the main channel in navigable rivers, as the true boundary between states, has for its primary object access to navigation by both sovereignties, and hence by the riparian citizens of the respective states; that such access cannot be taken away by establishing another channel, although it is conceded that the government in its sovereign capacity has the power to change the channel, and that no riparian owner can complain.

It is well settled that the sovereign power may, while improving navigation, take away the riparian right of access without compensation. (*Gibson v. United States*, 166 U. S. 269-272.) Congress has power to make any improvement in aid of navigation. It may require all navigators to pass along a required channel and may close any other channel to their passage. In the cases before the Supreme Court in *Gibson v. United States*, supra, and in *Scranton v. Wheeler*, 179 U. S. 141, the plaintiff's access and landing was cut off, or its use rendered less convenient. The property itself was not taken, but was subjected to the exercise of a servitude to which it

had always been subject. The government by its action  
190 changed no rights of property as between individuals. Such was neither the object nor effect of the exercise of this governmental function. In this case then the government had the right to make the channel improvement that it did make. It used such parts of the river bed as it needed to use, cutting away the sandbars and small islands that were regarded as obstructions to navigation, including parts of the island in controversy. In so doing it aimed to take, and did take, no property from complainant. Thus far the complainant had no rights in this island. The government might, perhaps, have taken this entire Tallas island for the necessities of navigation, but it did not do so; consequently, title to that portion which was left, after cutting the new channel, remained in Whiteside as before. The effect of complainant's contention is that this act of sovereignty created in him, as against the defendants, a proprietary right, which had no previous existence. This position seems to be in hopeless conflict alike with reason and authority. We can-



not agree that human agencies can thus suddenly bring about such like acts of nature admittedly cannot accomplish. Cutting this channel was analogous to avulsion; it could not operate to change the boundary between the States of Wisconsin and Minnesota. In view, the title to this island remains where it was before the government made this improvement, in which case, the complainant's title will not prevail. Nothing we have said is to be construed as limiting the power of the government of the United States in its sovereign capacity to make full use of the beds of navigable streams for the improvement of navigation.

A determination of the main question in favor of Whiteside necessarily operates to decide complainant's appeal in favor of Tallas. However, other considerations would lead to the same result. Ejectment will not entertain a bill seeking to enforce a merely legal title to land where there is a plain, adequate and complete remedy at law. (*Hall v. Babin et al.*, 19 Howard 271; *Whitehead v. Shattuck*, 10 U. S. 146; *Sanders v. Devereux*, (C. C. A.) 60 Fed. 311; *Jones v. MacKenzie et al.* (C. C. A.), 122 Fed. 390; *Union Pacific R. Co. v. Cunningham*, 173 Fed. 90.) Ejectment will lie by a riparian owner on a navigable stream to recover possession from an adverse claimant of an island formed by accretion in front of his shore although the naked title to the bed of the stream where it was formed is in the state, and complainant's right of possession is subject to any proper exercise of the sovereign power of the State in aid of navigation. (*Hall v. Hobart*, (C. C. A.) 186 Fed. 426.) It is therefore decided that ejectment is the proper remedy for the recovery of the possessory rights claimed here.

It is also urged that complainant, not being in possession, cannot maintain this action; and that because this is an action in rem, the land in the State of Wisconsin, the Minnesota Court is without jurisdiction for that reason. These contentions raise questions of serious moment, but in view of the conclusion reached upon 191 the merits of the controversy, it is deemed unnecessary to extend this discussion further.

It results that the decree of the trial Court dismissing the bill to the defendant Tallas should be affirmed.

As to the defendant Whiteside the decree will be reversed with directions that as to this defendant the bill be dismissed.

It is so Ordered.

Filed March 24, 1913.



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*(Decree in No. 3780.)*

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1912.

MONDAY, March 24, 1913.

No. 3780.

ROBERT B. WHITESIDE, Appellant,

vs.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, as to the defendant, Robert B. Whiteside, be, and the same is hereby, reversed with costs; and that Robert B. Whiteside have and recover against George W. Norton, as Executor and Trustee of the Estate of George W. Norton, deceased, the sum of Five Hundred Thirty-seven and 30/100 Dollars for his costs in this behalf expended.

It is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Minnesota, as the successor of the Circuit Court for said District, with directions to dismiss the bill as to the defendant, Robert B. Whiteside.

March 24, 1913.

*(Decree in No. 3787.)*

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1912.

MONDAY, March 24, 1913.

No. 3787.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellant,

vs.

ANDREW J. TALLAS.

193 Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.



On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, as to the defendant, Andrew J. Tallas, be, and the same is hereby, affirmed with costs; and that Andrew J. Tallas have and recover against George W. Norton, as Executor and Trustee of the Estate of George W. Norton, deceased, the sum of twenty dollars for his costs herein.

March 24, 1913.

*(Petition for Appeal to Supreme Court U. S.)*

United States Circuit Court of Appeals, Eighth Circuit.

ROBERT B. WHITESIDE, Appellant,

vs.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellee.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellant,

vs.

ANDREW J. TALLAS, Appellee.

The above named George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, being appellee in the above named Court as to the appeal of Robert B. Whiteside, and being appellant in said court as to an appeal against Andrew J. Tallas, appellee, respectfully shows that the above entitled

194 cause is now pending in the United States Circuit Court of Appeals, for the Eighth Circuit, and that a judgment has therein been rendered on the 24th day of March, 1913, reversing the decree of the District (formerly Circuit) Court of the United States, for the District of Minnesota, as to the appeal of the said Robert B. Whiteside, and a judgment has been rendered in the above entitled court on the 24th day of March, 1913, affirming the decree of the District (formerly Circuit) Court of the United States for the District of Minnesota, as to the appeal of said George W. Norton; as Executor and Trustee of the estate of George W. Norton, Deceased, against the said Andrew J. Tallas, both of said appeals having been taken in the suit commenced in said District (formerly Circuit) Court of the United States for the District of Minnesota, and entitled George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, Plaintiff, against Robert B. Whiteside, E. P. Alexander and Andrew J. Tallas, Defendants, and that the matter in controversy in said suit and in each of said appeals exceeds Two Thousand Dollars besides costs, and that this is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, said appellant, George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, prays that an appeal be allowed him in the above entitled cause from the said



judgment entered in said United States Circuit Court of Appeals for the Eighth Circuit in favor of said Robert B. Whiteside, and from the said judgment in said court in favor of the said Andrew J. Tallas, and directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the records and proceedings in said cause and all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

Dated, December 6th, 1913.

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JED L. WASHBURN,  
WILLIAM D. BAILEY,  
OSCAR MITCHELL,  
ALBERT C. GILLETTE,

*Solicitors and of Counsel for George W.  
Norton, as Executor and Trustee of  
the Estate of George W. Norton, De-  
ceased.*

It is Hereby Ordered that the appeal in the above entitled case to the Supreme Court of the United States be and the same is hereby allowed as prayed.

Dated, December 17th, 1913.

WILLIAM C. HOOK,  
*United States Circuit Judge, Eighth Circuit.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 17, 1913.

*(Assignment of Errors on Appeal to Supreme Court U. S.)*

The appellant, George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, in connection with the petition for appeal herein, presents and files therewith his assignment of errors, as to which matters and things he says that the decrees entered herein on the 24th day of March, 1913, are erroneous, to-wit:

As to the appellee Whiteside the court erred as follows:

First. In reversing the judgment and decree of the United States District (formerly Circuit) Court for the District of Minnesota, which decree of the lower court held that the appellant George W. Norton, as Executor and Trustee of the estate of George W. Norton, deceased, had the right to the property in question as against Robert B. Whiteside.

Second. In entering judgment and decree ordering said case remanded to the United States District Court, with directions to enter a decree dismissing the bill of complaint herein as to defendant Whiteside.

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Third. In holding that the enabling acts of Congress fixing the boundary line between the States of Wisconsin and Minnesota through Lake Superior and through the main channel



of the St. Louis River thereby so established the boundary line between the said states through said waters that the dredging, improving and straightening of said channel between the banks or shores by the Government in aid of navigation through the middle of the Bay and River St. Louis left a portion of the State of Wisconsin lying north of the improved, permanent main channel, and thereby upon both sides of the navigable waters thereof.

Fourth. In holding that the waters between the land of appellant Norton and appellee Whiteside are not an arm or bay of Lake Superior but are waters of St. Louis River.

Fifth. In holding that the small, low, marshy island (upon which Tallas squatted) formed after the patenting and conveying of the shore lands and long after the fixing of the constitutional boundaries of Wisconsin and Minnesota became attached to the lands owned by appellee Whiteside in Wisconsin and in not holding that the same belonged to the states in sovereign ownership the same as the rest of the bed of these waters, and in not holding that the raising of the bed in the form of such island above the surface of the water was without any controlling effect in this controversy.

Sixth. The court erred in holding that because the said channel was improved by the Government in aid of navigation after instead of before the formation of said little island that therefore so much of said island as was left north of the said improved channel attached to lands on the southerly side of such channel, thereby holding that the owner of lands on the southerly side of said main channel as improved became possessed of riparian rights and property on both sides of said channel to the extinction of all riparian rights of the owner of lands upon the northerly shore.

Seventh. In holding that because the thread of deepest water within the two shores or banks through this bay or this channel of the river, whichever it is called, in its sinuous course may have been at one time prior to said improvement to the one side or the other of the actual middle of said waters, that the same thereby became irrevocably fixed as the interstate boundary and that the boundary does not follow the course of the deepest navigable and navigated channel as improved by the Government in aid of navigation—substantially midway between the banks.

Eighth. In holding that by reason of the dredging and straightening of the channel within the banks by the Government in aid of navigation the appellant was thereby deprived of his riparian rights, and the rights to reach the main channel and navigable waters for the purposes of navigation.

Ninth. The court erred in not holding and deciding that the appellant Norton possessed as incidental to his shore ownership of the Minnesota lands the right to reach out to the navigable waters of said improved deep water channel, directly in front of his premises, with the right to construct docks and to improve, reclaim and occupy out to the established dock line, unimpeded by the portion of said island remaining upon the north side of said channel and unimpeded by the location of the earlier sinuous thread of deepest water.



Tenth. The court erred in treating this cause as an action to try the title to real estate subject as such to private ownership and erred in refusing to enter judgment and decree in favor of the appellant Norton against the appellee Whiteside as demanded in the bill of complaint herein.

The court further erred in its holding between appellant Norton and appellee Andrew J. Tallas as follows:

Eleventh. In affirming the judgment and decree of the United States Circuit Court for the District of Minnesota dismissing the bill of complaint as to said Andrew J. Tallas.

Twelfth. In holding and decreeing that it and the lower court had not jurisdiction in this action in equity to determine the rights of said defendant Tallas, but that resort must be had to an action at law to determine the same.

198 Thirteenth. In failing to render a decree in favor of appellant Norton against appellee Tallas for the relief prayed for in the bill of complaint herein, and in failing to hold the court had jurisdiction of the parties and the subject matter of the action, and therefore full power and authority to determine said cause as to all parties thereto.

Fourteenth. In failing to hold that the defendant Tallas having answered to the merits of said cause and having participated in the taking of testimony therein without raising any question as to the jurisdiction of the court as to him until after the report of the special master and the making up of the record and until the argument thereon, that the said defendant Tallas waived any right to object to the jurisdiction of a court of equity to determine said cause as to him.

Wherefore, appellant prays that the said decrees may be reversed and that the appellant may have the adjudication and decree in his favor as herein specified.

JED L. WASHBURN,  
W. D. BAILEY,  
OSCAR MITCHELL,  
ALBERT C. GILLETTE,

*Solicitors for Appellant, George W. Norton,  
as Executor and Trustee of the Estate of  
George W. Norton, Deceased.*

(Endorsed:) Filed in U. S. District Court of Appeals, Dec. 17, 1913.

*(Bond on Appeal to Supreme Court U. S.)*

Know all men by these presents, That we, George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, as principal, and Henry W. Cheadle and Edwin D. Field, of the County of St. Louis and State of Minnesota, as sureties, are held and firmly bound unto Robert B. Whiteside and Andrew J. Tallas, and each of them, in the sum of One Thousand Dollars (\$1,000.00), to be paid to the said Robert B. Whiteside and Andrew J. Tallas, their respective attorneys, heirs, executors, administrators or assigns, to which payment, well and truly to be



made, we bind ourselves, our respective heirs, executors and administrators, jointly and severally, firmly, by these presents.

Sealed with our seals and dated the 6th day of December, 1913.

Whereas, on the 24th day of March, 1913, a judgment and decree was rendered and entered in the above entitled action in said court against the above named George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, and in favor of Robert B. Whiteside, reversing the judgment and decree of the District (formerly Circuit) Court of the United States for the District of Minnesota; and,

Whereas, on said 24th day of March, 1913, a judgment and decree was entered in said action in favor of the said Andrew J. Tallas and against the said George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, affirming the judgment and decree of the United States Circuit Court, for the District of Minnesota, in said action, and the said George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, having taken and had allowed an appeal from said judgments to the Supreme Court of the United States to reverse the said judgments and decrees rendered and entered in said cause in said Circuit Court of Appeals, and a citation directed to said Robert B. Whiteside and said Andrew J. Tallas has been or is about to be issued directing them to appear at a session of the Supreme Court of the United States to be held in the City of Washington, in the District of Columbia;

Now, therefore, the condition of this obligation is such that if the said George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, shall prosecute such appeal to effect, and answer all damages and costs if he fails to make said appeal and his plea good, then this obligation shall be void, otherwise to remain in full force and effect.

GEORGE W. NORTON,  
As Executor and Trustee of the Estate of  
George W. Norton, Deceased,  
By JED L. WASHBURN,  
His Solicitor.

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HENRY W. CHEADLE.  
EDWIN D. FIELD.

STATE OF MINNESOTA,  
County of St. Louis, ss:

On this 6th day of December, 1913, before me, a Notary Public within and for said county, personally appeared Jed L. Washburn, Solicitor for George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, to me personally known to be the Solicitor for said George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, and acknowledged that he executed the foregoing bond as Solicitor for said George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, and as his free act and deed and as his free act and deed as such solicitor.



And at the same time and place also appeared Henry W. Cheadle and Edwin D. Field, to me known to be two of the persons described in and who executed the foregoing instrument and bond as sureties, and acknowledged to me that they executed the same as their free act and deed.

[SEAL.]

C. M. VAN NORMAN,  
*Notary Public, St. Louis County, Minnesota.*

My commission expires Nov. 12-1915.

STATE OF MINNESOTA,

*County of St. Louis, ss:*

Henry W. Cheadle and Edwin D. Field, the sureties named in the foregoing bond, being first duly sworn, each for himself says that he is a resident and freeholder of the County of St. Louis and State of Minnesota, and is worth the sum of One Thousand Dollars over and above all his just debts and liabilities and exclusive of his property exempt from execution.

HENRY W. CHEADLE.  
EDWIN D. FIELD.

201 Subscribed and sworn to before me this 6th day of December, 1913.

[SEAL.]

C. M. VAN NORMAN,  
*Notary Public, St. Louis County, Minn.*

My commission expires Nov. 12-1915.

The foregoing bond is approved this 17th day of December, 1913.

WILLIAM C. HOOK,  
*United States Circuit Judge, Eighth Circuit.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 17, 1913.

202 United States Circuit Court of Appeals, Eighth Circuit.

ROBERT B. WHITESIDE, Appellant,  
vs.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellee.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellant,

vs.  
ANDREW J. TALLAS, Appellee.

The United States of America to Robert B. Whiteside and Andrew J. Tallas:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in



the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, in which appeal George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, is appellant and you are appellees, to show cause, if any there be, why the judgments and decrees rendered on the 24th day of March, 1913, in said court against said George W. Norton, as Executor and Trustee of the estate of George W. Norton, deceased, and in favor of said Robert B. Whiteside and said Andrew J. Tallas, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William C. Hook, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 17th day of December, in the year of our Lord one thousand nine hundred and thirteen, and the independence of the United States the one hundred and thirty-seventh.

WILLIAM C. HOOK,  
*Judge of the United States Circuit Court  
of Appeals, Eighth Circuit.*

Personal service of the within citation, by copy delivered, is acknowledged in behalf of appellees as follows:

Dec. 19th, 1913.

ALFRED JAQUES,  
THEODORE T. HUDSON,  
LUTHER C. HARRIS,  
*Solicitors for Appellee Robert B. Whiteside.*  
DAN L. G. CASH AND  
J. B. RICHARDS,  
*Solicitors for Appellee Andrew J. Tallas.*

203 [Endorsed:] Original. United States Circuit Court of Appeals, Eighth Circuit. No. 3780. Robert B. Whiteside, Appellant, vs. George W. Norton, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellee. No. 3787. George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, Appellant, vs. Andrew J. Tallas, Appellee. Citation. Jed L. Washburn, Wm. D. Bailey and Oscar Mitchell, Solicitors and of Counsel for George W. Norton, as Executor and Trustee of the Estate of George W. Norton, Deceased, Alworth Building, Duluth, Minnesota. Filed Dec. 22, 1913. John D. Jordan, clerk.



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*(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcripts of the record from the Circuit and District Courts of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein Robert B. Whiteside is Appellant, and George W. Norton, as Executor and Trustee of the Estate of George W. Norton, deceased, is Appellee, No. 3780, and wherein George W. Norton, as Executor and Trustee of the Estate of George W. Norton, deceased, is Appellant, and Andrew J. Tallas, is Appellee, No. 3787, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon, on the appeal of George W. Norton, as Executor and Trustee of the Estate of George W. Norton, deceased, to the Supreme Court of the United States, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifth day of January, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,  
*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*

205 In the Supreme Court of the United States, October Term,  
1914.

No. 339.

GEORGE W. NORTON, Executor, etc., Appellant,  
vs.  
ROBERT B. WHITESIDE et al., Appellee.

It is hereby stipulated between the parties to the above entitled cause that the reproduction or printing of the maps which are exhibits in said cause may be omitted and the transcript of the record



printed without them. Parties will file with the Clerk before argument, and will produce on the argument, such maps and plats from the record as they desire to refer to.

Dated, Duluth, Minn., Oct. 13th, 1914.

JED L. WASHBURN,  
WILLIAM D. BAILEY,  
OSCAR MITCHELL,  
ALBERT C. GILLETTE,

*Solicitors and of Counsel for Appellant.*

THEO. T. HUDSON,  
ALFRED JAQUES,  
LUTHER C. HARRIS,

*Solicitors and of Counsel for Appellee Whiteside.*

D. G. CASH &

JOHN B. RICHARDS,

*Solicitors and of Counsel for Appellee Tallas.*

[Endorsed:] 339/24019.

207      [Endorsed:] File No. 24,019. Supreme Court U. S., October term, 1914. Term No. 339. George W. Norton, Executor, etc., Appellant, vs. Robert B. Whiteside et al. Stipulation as to printing record. Filed October 16, 1914.

Endorsed on cover: File No. 24,019. U. S. Circuit Court Appeals, 8th Circuit. Term No. 339. George W. Norton, as Executor and Trustee of the estate of George W. Norton, deceased, appellant, vs. Robert B. Whiteside and Andrew J. Tallas. Filed January 15th, 1914. File No. 24,019.



No. 55

FILED

FEB 24 1911

JAMES H. DAN

# Supreme Court of the United States

OCTOBER TERM, 1911

GEORGE W. NORTON, as Executor and Trustee of  
the Estate of GEORGE W. NORTON, Deceased,  
Petitioner

against

ROBERT B. WHITESIDE, Respondent

\* \* \*

GEORGE W. NORTON, as Executor and Trustee of  
the Estate of GEORGE W. NORTON, Deceased,  
Petitioner

against

ANDREW J. TALLAS, Respondent

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF  
HABEAS CORPUS

JED L. WARREN,  
WILLIAM D. BAILEY,  
OSCAR MITCHELL,  
ALBERT O. GILLETTE,

Solicitors and of Counsel for Petitioner



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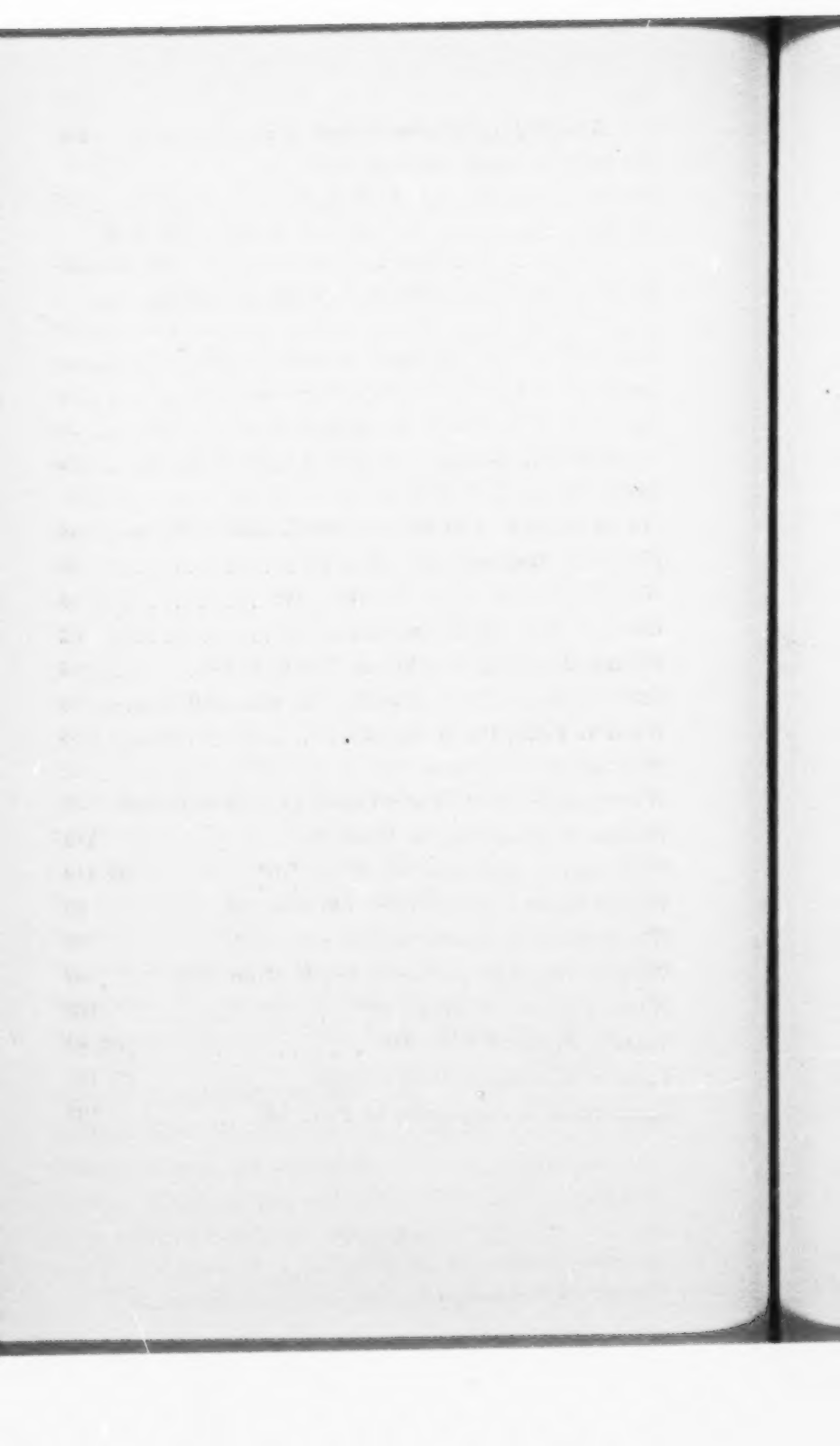


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# Supreme Court of the United States

OCTOBER TERM, 1913.

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GEORGE W. NORTON, as Executor and Trustee of  
the Estate of GEORGE W. NORTON, Deceased,  
Petitioner.

against

ROBERT B. WHITESIDE, Respondent.

\* \* \* \*

GEORGE W. NORTON, as Executor and Trustee of  
the Estate of GEORGE W. NORTON, Deceased,  
Petitioner,

against

ANDREW J. TALLAS, Respondent.

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**Petition for Writ of Certiorari and Brief in Support Thereof.**

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Comes now George W. Norton, as Executor and Trustee of the estate of George W. Norton, deceased, by Jed L. Washburn, William D. Bailey, Oscar Mitchell and Albert C. Gillette, his solicitors and counsel, and moves this honorable court that it shall, by certiorari or other proper process directed to the honorable the Judges of the United States Circuit Court of Appeals, for the Eighth Circuit, require the said court to certify to this court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the Respondent Robert B. Whiteside was appellant and your petitioner, George W. Norton, was appellee, and wherein, being a part of the same cause in the court below, the peti-



tioner, George W. Norton, as Executor and Trustee of the estate of George W. Norton, deceased, was appellant, and the respondent Andrew J. Tallas was appellee, and to that end he now tenders herewith his petition and brief, with a certified copy of the entire record of said cause in said Circuit Court of Appeals.

JED L. WASHBURN,

WILLIAM D. BAILEY,

OSCAR MITCHELL,

ALBERT C. GILLETT,

Solicitors and of Counsel for Petitioner.



THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1913.

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GEORGE W. NORTON, as Executor and Trustee of  
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against

ANDREW J. TALLAS, Respondent.

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TO THE HONORABLE THE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE UNITED STATES:

Your petitioner, George W. Norton, as Executor and Trustee of the estate of George W. Norton, deceased, represents that in the Circuit (now District) Court of the United States for the District of Minnesota, the above named petitioner in 1910 commenced a suit in equity against the respondents Robert B. Whiteside and Andrew J. Tallas, and that the decision of said Circuit Court was in favor of said Norton as between him and said Whiteside, and against said Norton as between him and said Tallas and that said Whiteside appealed to the United States Circuit Court of Appeals for the Eighth Circuit from the decision in favor of said Norton, and the said Norton appealed to said Circuit Court of Appeals from the decision in favor of said Tallas, the said suit in equity being



commenced as a single suit, and separate appeals having been taken to said Circuit Court of Appeals from the judgment therein, and that said Circuit Court of Appeals entered a judgment of reversal on the appeal taken by said Whiteside, and a judgment of affirmance on the appeal taken by your petitioner, George W. Norton, as between him and said Tallas.

The judgment and decree of said Circuit Court for the District of Minnesota, which is found from Folios 271 to 285 of the Record, contains a statement of the matters here involved, and a short summary of such matters and of said decision is as follows:

1. The matter in dispute, exclusive of interest and costs, exceeds two thousand dollars.

2. George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, is and for several years prior to the filing of decree in 1911 was the owner in fee of Government Lot 1 and the Northeast Quarter of Northeast Quarter of Section 23, and Government Lot 2 of Section 24, Township 49 North, of Range 15 West, and of Lots A and B in Block 41, Lots C and D in Block 40, Lots G and H in Block 37, Lots I and J in Block 38, and Lots K. L. M. and N in Block 42, all in Hunter & Markell's Grassy Point Addition to Duluth, Minnesota, according to the recorded plat thereof, said town lots being a part of Lot 1, of Section 24-49-15, together with appurtenances and all riparian rights, unless divested of any thereof by virtue of the possession of respondent Tallas of a certain unsurveyed island hereinafter referred to.

3. The respondent Whiteside was and for a number of years prior to the filing of said judgment and decree had been the owner in fee of Lots 4 and 5, in Section 19, Township 49 North, of Range 14 West,



and Lots 1 and 2 of Section 24, and Lots 1, 2 and 3, of Section 25, all in Township 49 North, of Range 15 West; also Lot 2 of Section 24, Township 49 North, of Range 15 West, except a small parcel in said Lot 2 owned by one E. P. Alexander, said Alexander having also been made a party defendant in said action brought by petitioner in said Circuit Court, but it having been stipulated therein that the rights of said Alexander should be governed by the determination as to said Whiteside, and said Whiteside and Alexander were the owners of all riparian rights ever incident to said lands owned by them respectively, unless divested of any thereof by possession on the part of the said Tallas of some portion of an unsurveyed island mentioned in the foregoing paragraph and hereinafter referred to.

4. Said Township 49, Range 14, was surveyed by the United States in 1854, and the plat approved July 17th of that year, and Township 49, Range 15, was surveyed and platted in 1857, and the plat approved the same year.

5. Lands above described as belonging to George W. Norton were patented by the United States in 1860, and said Norton derived title thereunder. The above lands of the respondent Whiteside were patented as follows: Those in Section 19-49-14, and in 24-49-15 entered in the year 1867 and patented in 1868; those in 30-49-14 entered in 1859 and patented in 1860, and the balance of said Whiteside's lands passed under certain land grants made by Congress to the State of Wisconsin for the benefit of certain railroad companies in the year 1850, and subsequently patented.

6. All of the lands owned by above parties were part of the Northwest Territory organized under the ordinance of 1787, under which ordinance and subse-



quent acts of Congress passed prior to disposition of any lands here involved it was provided that navigable waters emptying into the Mississippi and St. Lawrence Rivers should forever be and remain public highways, free forever to the inhabitants of said Territory and the citizens of the United States and those of other states that might be admitted, and it was considered by the Circuit Court that the federal government retained over said navigable waters and over the regulation of commerce thereon paramount control, including the power to improve the same in the aid of navigation and commerce, and that, amongst others, the State of Wisconsin and a part of the State of Minnesota were formed out of said territory.

7. That in the Enabling Act of Congress for the formation of a state government in Wisconsin Territory, approved August 6, 1846, the northerly and westerly boundary of the State of Wisconsin was described in part as follows:

"Thence down the main channel of the Montreal River to the head of Lake Superior; thence through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same above the Indian Village, according to Nicollet's map; thence due south to the main branch of the St. Croix River."

In the enabling act passed by Congress to authorize the people of the Territory of Minnesota to form a constitution and state government, approved February 26th, 1857, the southerly, easterly and northeasterly boundaries of said future state were described as follows:

"Thence east, along the northerly boundary of the State of Iowa to the main channel of the Mississippi River; thence up the main channel of said river, and



following the boundary line of the State of Wisconsin, until the same intersects the St. Louis River; thence down said river, to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British possessions."

These were the descriptions of the boundaries embraced in the constitutions under which the said states were formally admitted to the Union.

8. The eighth paragraph of the judgment and decree of the Circuit Court reads as follows:

"It is considered by the court that the Saint Louis River is substantially correctly described in the bill of complaint down to the first falls above Fond du Lac, or the Indian Village. But it is not considered by the court necessary in this case to determine where the river ends and the lake begins; nor whether the waters at the *locus in quo* are more properly designated as waters of the lake or of the river, for, in the view of the court, the result in the case must be the same whether these waters are river waters or waters of an arm of Lake Superior. Whatever the character of these waters, the boundary line between Wisconsin and Minnesota would in the opinion of the court, and it is so found, follow the main navigable channel between Big Island and the Minnesota shore, that is, between the shore line of plaintiff on the one side and the shore line of defendants Whiteside and Alexander on the other."

9. The waters from the main body of Lake Superior up to the first falls above the Indian Village, which is substantially synonymous with the old town of Fond du Lac, now within the corporate limits of the City of Duluth, are and ever have been navigable, and boats and vessels navigating the Great Lakes have



from the earliest times navigated such waters that far.

10. The lands of the said Whiteside and Alexander constitute a large island, at various times called by such names as "The Island," "Big Island," "Clough's Island," etc., there being a channel of navigable water upon both the northerly and southerly sides of said island.

11. The so-called "Big Island" was at the time of surveying and platting of said township treated as in Wisconsin, and the boundary line between the States of Wisconsin and Minnesota has ever since been acquiesced in by the said states as running through, and does run through, the waters between said Big Island and the northerly shore of said waters. The said lands of petitioner abut upon said waters on the northerly side and the lands of the defendant Whiteside abut upon said waters on the southerly side.

12. The said waters at the *locus in quo* were designated upon the government plats of the survey of said township as St. Louis Bay, and were claimed by said Norton to be part of the waters of Lake Superior, and by the defendants to be an expansion of the St. Louis River. The said waters at the point in question between Big Island, owned by the respondent Whiteside, and the lands of the plaintiff on the northerly shore were about 2,000 feet wide, and the course of the main navigable natural channel through the same was sinuous, in some places being nearer one shore than the other, or vice versa. The lower court found that the boundary line between the states followed the middle thread of said main navigable natural channel up to the time of the making of the improved or government channel.

13. Subsequent to the survey of the public lands upon both sides of said waters and the disposition



thereof by the government as aforesaid, there gradually became formed a low, marshy, irregular shaped island in the waters between the lands now owned by the said Norton and those of the said Whiteside, which has at times been entirely covered with water and has changed in contour, extent and form. The same has never been surveyed, platted or disposed of as public land, and the Circuit Court held that the same vested, like other parts of the bed of said waters, and was held in trust by the same character of title and for the same purposes as the residue of the bed or subaqueous land, and that no person could acquire private ownership thereof or control over the same in any manner, except as inhere in the owners of the shore lands abutting upon said waters as riparian rights and privileges, and that subject to the public rights and paramount control of the government such riparian owners as may be entitled thereto have the exclusive right and control and use of the same.

14. Under the act of Congress of September 19, 1890, the War Department established dock lines on the Minnesota and Wisconsin sides, which were approved December 5, 1894. Such dock line upon the Minnesota side in front of the lands of the plaintiff hereinbefore described, extended through said low, marshy island, and the dock line on the Wisconsin side in front of the lands of said Whiteside was some distance to the southward of said low, marshy island.

15. Under the acts of Congress of June 13, 1892, June 3, 1896, and March 3, 1899, the War Department made a survey and examination of said waters, re-established dock lines upon both sides, the same being at some points nearer and at some points farther from the respective shores than the dock lines previously established, and the same were established with a view to the immediate improvement of the deep water chan-



nel through said waters in the aid of navigation and commerce. The dock line in front of petitioner's premises is substantially identical with the one previously established, but on the Wisconsin side in front of said Whiteside's premises it is at some points nearer thereto than the previous dock line, but at all points is southerly from the so-called marshy island hereinbefore described and from the improved channel in said waters hereinafter referred to.

16. The map and survey of the harbor and dock lines were approved by the Secretary of War November 17, 1899, and the dock and harbor lines upon the Minnesota side in the said waters in front of the lands of petitioner extended through the said low, marshy island, and likewise the channel which the government improved passed through said island.

17. The War Department improved said channel within said harbor lines in accordance with the survey and map, and improved, deepened and straightened the navigable channel through said waters between said harbor lines, the said improved channel crossing and recrossing the original course of deepest water, but running generally in the same direction and practically midway between shores, and operating in the aid of navigation and commerce to deepen and straighten the navigable and navigated channel in said waters between the shores thereof, and make the same more practicable, and in the making of said improvement the War Department cut through the said low, marshy island, leaving a small part thereof between the harbor or dock line on the Minnesota side and the shore and a small parcel between said deep water channel and the established harbor line on the Wisconsin side in front of said Whiteside's lands, and this latter parcel afterwards disappeared and no longer exists. The government channel so dredged was about midway between



the shore lands of the petitioner and the shore lands of the defendant Whiteside.

18. In the improvement of said channel the government dredged out a considerable amount of material and deposited the same upon said portion of said low, marshy island on the northerly side of the channel, and in extension of said portion of said island, and by reason thereof there is now much more land appearing above the water than appeared formerly before said improvement was made, the same operating to build a reef of land extending above the water lying between said improved navigable and navigated channel and the original Minnesota main shore. The original deep water channel through the waters in front of petitioner's land has been entirely closed at a point opposite the said lands by reason of the depositing of said dredging material and the formation of said reef of land and no longer exists as a continuous channel, and is no longer a part of the navigable and navigated channels of the waters in front of said petitioner's lands, having been abandoned as such by the government, and it is apparent that the same will gradually become more and more shallow by the natural action of the waters, thus depriving petitioner of access to the improved navigable and navigated channels of said waters in front of his premises save by extending out over the shallow water and across said portion of said unsurveyed island remaining, and the said land made by the government dredging.

19. That one of the principal elements of value to the petitioner's land is the right of access, of wharfage or other improvement to the navigable waters in front thereof.

20. That the said Whiteside and his associate Alexander have access to navigable water from in front



of their said lands southerly of said navigable channel free from any impediment whatever.

21. All of the original defendants claim that the boundary between Wisconsin and Minnesota extended through the water between this low, marshy, unsurveyed island and the main land on the Minnesota side, because at that particular place the said sinuous course of deepest water at one time lay between said island and said shore, although there is no proof as to where the course of deepest water was at the time of the admission of these states into the Union, and none available.

22. Said improvement by the government was made from the years 1899 to 1902, inclusive.

23. The respondent Tallas had a small cabin upon a portion of said the newly formed, marshy island when said work was begun, which cabin was thereafter burned, it having stood on posts near the northerly point or shore thereof. He thereafter constructed another cabin, existing thereon at the time of the decree, some distance farther in upon the marshy island, and at the time of the commencement and trial of the action was in possession of such portion of such island as was occupied by him, claiming to own the same by virtue of continued possession thereof.

24. The defendant Whiteside and the defendant Alexander, whose rights by stipulation were to be determined the same as Whiteside's, claimed that because of their ownership of Big Island their original riparian rights extended to the line of deepest water between their lands and the plaintiffs, and that notwithstanding the government had dredged out and straightened the navigable channel, thus placing such navigable channel southerly of the original line of deepest water, they still had the right to claim and occupy clear across the



channel so dredged and straightened by the government, and thus to claim and have rights of occupancy on both sides of the navigable channel so straightened and dredged, and entirely cut off any access of the petitioner thereto, notwithstanding before such straightening they had the right to own and occupy the riparian property only on one side of the navigable and navigated channel. The petitioner maintained that such claims on their part worked a cloud upon his title to his lands abutting upon said waters, and the rights and privileges and riparian rights incident thereto, and if persisted in would deprive the petitioner of one of the chief benefits and enjoyments of his said land, and one of the chief elements of the value thereof, and the suit in question was brought to adjudicate the rights of the parties, and, to have it adjudged that the plaintiff Norton's riparian rights and privileges extended to the improved navigable and navigated deep water course.

25. The Circuit Court held that the claims of Whiteside and Alexander were unfounded, and that their rights did not extend beyond the said navigable and navigated channel as dredged out and straightened by the government, and that they had no right to interpose any obstruction to the petitioner's enjoyment of his said lands on the Minnesota shore, and of the riparian rights and privileges incident thereto, including his right of access, to reach out to the said improved navigable channel between said dock lines, and over and across the made land resulting from the deposit of said dredging material, and petitioner's rights were not abridged so as to prevent such access and exclusive right and enjoyment by reason of any interstate boundary in the bed of said waters, and held that the interstate boundary was not an inflexible one, but the same follows through the improved channel made by the federal government by authority of Congress between said



banks and shores and between said dock lines in the improvement of said navigable channel in the aid of commerce and navigation.

26. The rights of petitioner by reason of the ownership of the shore were held by the Circuit Court to extend out to the improved and straightened channel, subject to the paramount right of the government and the public between the dock line and the original shore line, but free, clear and discharged of any claim on the part of the defendants Whiteside and Alexander.

27. It was further held by the Circuit Court that said respondent Tallas, being in physical possession of such portion of said unsurveyed marshy island as he was in possession of, that the court had not jurisdiction in the said action in equity to determine his rights, but that resort must be had to an action at law to determine the same, and the Circuit Court therefore dismissed the said action or suit as to said Tallas without prejudice to the petitioner to have recourse to a court of law to determine the same. The judgment and decree of the Circuit Court was rendered and entered by the Circuit Court on June 14th, 1911.

From that decision of the Circuit Court the said respondent Whiteside appealed to the Circuit Court of Appeals, for the Eighth District, and the petitioner appealed from the said decision in so far as it dismissed his bill against said Tallas.

On March 24th, 1913, the Circuit Court of Appeals of the Eighth Circuit reversed the decree of the lower court, with directions that as to said respondent Whiteside the bill be dismissed, and affirmed the decree of the lower court dismissing the bill as to said Tallas. The decision is reported in 205 Federal, page 5.

Upon the foregoing statement of facts and the Record in the cause, the petitioner submits the following



reasons why the judgment of the Circuit Court of Appeals reversing the decree of the Circuit Court as to said respondent Whiteside and affirming its decree as to the respondent Tallas, and remanding the cause to the lower court, with directions to dismiss the petitioner's bill as to both of said parties, should be brought here for review by this court.

First: Because of the great importance of the case as to the public and to the parties and to others similarly situated. The decision of the Circuit Court of Appeals involves a holding as to the boundary lines between the states of Wisconsin and Minnesota, the holding of the Circuit Court of Appeals being that such boundary was irrevocably fixed in the sinuous line of the deepest and most navigable channel as it at one time may have existed, which channel has long since disappeared by reason of the straightening, improving and dredging thereof by the government pursuant to acts of Congress, by there having been developed a straight and easily navigable channel, such straightening being merely a taking out of the sinuosities of the original course and entirely within the banks of the original waters, and without in any instance cutting into the original shore lines.

A following of this holding would affect a large amount of property in the immediate vicinity up and down these waters, and would in a great many instances leave very small areas northerly of the main channel as dredged and straightened by the government in the State of Wisconsin, and like small areas on the southerly side of the channel as straightened and dredged in the State of Minnesota and would involve a great confusion, particularly as time goes on and the properties on both sides of the channel are developed, in having such small areas belonging to one state and across the channel in another, and particularly with reference to



the exercise of police power by the respective states as to such small parcels; also the exercise by the respective states of their taxing powers. This would be a great detriment to both states, as the channel as improved by the government is the permanent, straightened channel which undoubtedly will be used for all navigation purposes for all time to come.

Second: Because the Circuit Court of Appeals erred in holding that the enabling acts of Congress fixing the boundary lines between the states of Wisconsin and Minnesota through Lake Superior and through the main channel of the St. Louis River thereby so established the boundary line between said states that the dredging, improving and straightening, of said channel between the banks, all authorized by the government, in the aid of Navigation through the middle of the bay and river St. Louis left a portion of the State of Wisconsin lying north of the improved permanent, main channel and upon both sides of the navigable waters thereof, and the effect thereof will be a holding that likewise a portion of the State of Minnesota lies south of such improved, permanent, main channel.

Third: Because the Circuit Court of Appeals erred in holding that the waters between the land of petitioner Norton and respondent Whiteside are not an arm of Lake Superior but are waters of St. Louis River.

Fourth: Because the Circuit Court of Appeals erred in holding that the small, low, marshy island (upon which Tallas squatted), formed after the patenting and conveying of the shore lines, and long after the fixing of the constitutional boundaries of Wisconsin and Minnesota, became attached to the lands owned by Whiteside in Wisconsin, and in not holding that the same belonged to the states in sovereign ownership,



the same as the rest of the bed of these waters, and in not holding that the rising of the bed in the form of such island above the surface of the water was without any controlling effect in this controversy.

Fifth: Because the Circuit Court of Appeals erred in holding that by reason of the fact that such channel was improved by the government in aid of navigation after instead of before the formation of said little island, therefore so much of the said island as was left north of said improved channel attached to the lands on the southerly side of such channel there by holding that the owner of the land on the southerly side of said main channel as improved became possessed of riparian rights and property on both sides of said channel to the extinction of all riparian rights of the owner of land on the northerly shore.

Sixth: Because the Circuit Court of Appeals erred in holding that the boundary does not follow the course of the deepest navigable and navigated channel as improved by the government in aid of navigation substantially midway between the banks, and particularly where, as in this case, such improvement is the first improvement made by the government, is of such a character as merely to straighten the sinuosities of the course of deepest water entirely within the boundaries of the original waters, and is of a permanent, lasting character, unquestionably fixing for all time the real navigable and navigated channel within such boundaries.

Seventh: Because the Circuit Court of Appeals erred in holding that by the straightening of the channel within the banks by the government in aid of navigation petitioner was thereby deprived of all riparian rights, and the rights to reach the main channel of navigable waters for the purpose of navigation, and



the respondent Whiteside was, in effect, made the owner of the riparian rights on both sides of the improved channel although he owned no shore land on the northerly side thereof, and although he would thereby absolutely cut off all riparian rights of petitioners.

Eighth: Because the Circuit Court of Appeals erred in treating this cause as an action to try the title to real estate, subject as such to private ownership, to-wit, the title to the unsurveyed island.

Ninth: Because the Circuit Court of Appeals erred in holding that it and the lower court had not jurisdiction in this action in equity to determine the rights of the said respondent Tallas as an occupant of part of said island and as incidental to the main cause, but that resort must be had to an action at law to determine the same, and in ordering a dismissal of the bill as to him. Talas answered in the cause and asked for affirmative relief and participated in the taking of testimony.

Tenth: Because the Circuit Court of Appeals erred in failing to hold that defendant Tallas having answered to the merits of said cause, and having participated in the taking of testimony therein without raising any question as to the jurisdiction of the court as to him until after the report of the Special Master, the making up of the record, and in the argument thereof, the said Tallas waived any right to object to the jurisdiction of a court of equity to determine such cause as to him.

Your petitioner believes that the aforesaid decree and decision of the Circuit Court of Appeals is erroneous, and that this honorable court should require this case to be certified to it for its review and determination in conformity with the provisions of the act of Congress in such cases made and provided.



Your petitioner has attempted to perfect an appeal to this court from the decision and decree of the Circuit Court of Appeals, but there exists some doubt whether petitioner is entitled as of right to an appeal to this court from said judgment, decree and decision, or whether the decision and decree of said Circuit Court of Appeals is final within the meaning of the act of congress entitled "An act To Codify, devise, and amend the laws relating to the judiciary," approved March 3, 1911, being Chapter 231 of Vol. 36 of the Statutes at Large.

Your petitioner is a resident and citizen of the state of Kentucky, and the respondent Whiteside is a resident and citizen of the State of Minnesota, and the Respondent Tallas is likewise a resident of the State of Minnesota, unless possibly it should be found that his residence is on the island in question and that said island is in the State of Wisconsin, in which case he would be a resident of the State of Wisconsin.

By reason of the diversity of citizenship the Circuit Court and the said Circuit Court of Appeals of the Eighth Circuit unquestionably had jurisdiction, but petitioner has always contended and contends now that the jurisdiction of the United States Courts is not dependent entirely upon the opposite parties to said suit being citizens of different states, but that this is a case arising under the constitution and laws of the United States as well. The question as to whether the suit is one arising under the constitution or laws of the United States is not free from doubt, and if it should be held that it is not, then petitioner concedes that the decision and decree of the Circuit Court of Appeals is made final, except as petitioner would be entitled to review thereof by certiorari to this court, as provided in Section 240 of said Chapter 231 of Vol. 36 of the



Statutes at Large. That the judgment of said Circuit Court of Appeals was entered on the 24th day of March, 1913, and said matter cannot be heard in this court until more than one year shall have elapsed from said date, and if it should be held that said appeal does not lie, then it would be too late to apply to this court and have allowed a writ of certiorari, and therefore petitioner is applying for writ or certiorari in order that said cause certainly may be brought before this court in proper form for the decision of the questions here involved.

Your petitioner presents herewith as a part of this petition a brief showing more fully his views upon the questions involved, and a transcript of the record in the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals, for the Eighth Circuit demanding said court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was entitled in that court, "Robert E. Whiteside, Appellant, against George W. Norton, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appellee," and "George W. Norton, as Executor and Trustee of the estate of George W. Norton, Deceased, Appellant, against Andrew J. Tallas, Appellee," to the end that this cause may be reviewed and determined by this court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem proper, and that said decree and judgment of the Circuit Court of Appeals may be reversed by this honorable court. Petitioner further prays that the transcript of the record on the appeal



GEORGE W. NORTON, as executor and trustee of the estate of George W. Norton, Deceased.

JED L. WASHBURN,  
WILLIAM D. BAILEY,  
OSCAR MITCHELL,  
ALBERT C. GILLETT.

**His Attorneys and Solicitors.**

State of Minnesota, )  
 ) ss.  
County of St. Louis, )

**JED L. WASHBURN**, being first duly sworn, says that he is one of the solicitors and of counsel for George W. Norton, Executor and trustee of the estate of George W. Norton, Deceased, petitioner in the foregoing petition; that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes, and that in his opinion the petition is well founded as to matters of fact and as to matters of law, and that the case is such that the prayer in the petition should be granted by this honorable court.

**JED L. WASHBURN,**

Subscribed and sworn to before me this 7th day of  
February, 1914.

ABBOTT McC. WASHBURN,  
Notary Public, St. Louis County, Minn.

My commission expires Sept. 1, 1918.

(Notarial Seal.)



## STATEMENT OF FACTS.

Lake Superior, as not unusual with the beginning of a great body of water, at its western extremity is broken up into numerous bays and indentations into the land. The upper or westerly end of the lake is shown upon various of the exhibits in the transcript, but for ready illustration we prefix to this brief two small maps, sections from these exhibits.

The shores or banks of the basin of Lake Superior vary in height from 20 to 60 ft., and further back are still higher, especially on the north shore. The St. Louis River, as shown by the complaint and the proof and as partially illustrated by the map exhibits, has its source in the lakes and forests some seventy-five miles northward from the City of Duluth, is for the most part a rapid stream, takes a circuitous course, flowing with great velocity through well-defined and for long distances through natural rock wall banks, down steep declivities and over a rocky bed, creating in its course great water-powers, and finally after forming the first falls above the Indian village mentioned in the constitutional boundary, drops into the basin of Lake Superior. The Indian village mentioned in the constitution is practically synonymous with the town of Fond du Lac, now a part of the City of Duluth. Below these falls the main channel of the river can well enough be followed until its waters merge into the waters of Lake Superior at Big Island, which island is encircled by the waters of Lake Superior, locally designated as Spirit Lake, St. Louis Bay and Pokegama Bay.

The St. Louis River is and always has been navigable below the Indian village. The constitutional boundary as designated for Wisconsin and also for Minnesota was general, as might be expected in a new and wild country. It took no account of local names, but was described for Wisconsin as running



"through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same above the Indian village according to Nicollet's map."

In the Minnesota Enabling Act the boundary from the southwest corner of the state was said to run

"thence along the northerly boundary of the State of Iowa to the main channel of the Mississippi River; thence up the main channel of said river, and following the boundary line of the State of Wisconsin until the same intersects the St. Louis River; thence down said river to and through Lake Superior on the boundary line of Wisconsin and Michigan until it intersects the dividing line between the United States and the British possessions."

There was no mention made of the bays at or forming the head of Lake Superior, no definite point fixed where the river ends and the lake begins. Nicollet's map was a large map on a small scale. It covered a large section. It was a hydrographical map of the Upper Mississippi River and showed the head of Lake Superior. The government land maps of these waters and of the surveyed lands bordering thereon designated these waters clear up past the locus in quo as St. Louis Bay. The expanse of water above St. Louis Bay, or perhaps properly the upper and enlarged end of the bay, has ever been known locally as Spirit Lake. The map showed a long bay extending from St. Louis Bay southward far into the Wisconsin side, designated as Pokegama Bay. Big Island lay between these bays, or in the angle of these bays. The map showed a definite channel designated as St. Louis River as far down as the southwesterly end of Big Island, and below this there was no designation of a river nor did the body of water in any respect resemble a river, but rather that of a part of the lake. There was a channel of water southeast of Big Island connecting with Pokegama Bay



and one to the west entering St. Louis Bay. From an inspection of the map and as well of the premises, it would appear as though the waters of the river broke against Big Island and then through these separate channels entered these bays. Going further east we encounter a point of low land jutting from the Minnesota side into St. Louis Bay known as Grassy Point, and further on there are two points of land, one extending from the Minnesota side and one from the Wisconsin side, known respectively as Rice's and Connor's Points, and still further east of this we encounter two points of land likewise extending from the respective states, one from the Minnesota side known as Minnesota Point about seven miles long, and one from the Wisconsin side known as Wisconsin Point about two miles long. The large expanse of water between these four points is no longer called St. Louis Bay, but has ever been designated on government maps as Superior Bay, or, as we of Minnesota now prefer to call it, the Bay of Duluth.

Minnesota Point and Wisconsin Point are of sand and gravel and are of much more recent formation than the lake basin and its shores. Water is encountered at a few feet in depth and at places the waters nearly cut Minnesota Point apart and at intervals have washed through. (See testimony Alfred Merritt, p. 50 transcript.) There is a scrubby growth of timber at places and sand barrens at places. The entry or strait between these two points is commonly called the Superior Entry. A canal many years ago was cut across Minnesota Point near the north shore, which is commonly called the Duluth Entry, these being the entries into the harbor.

Opposite the Superior Entry Nemadji River, a large Wisconsin stream, flows northerly, emptying into the bay. The waters east of the mouth of this river are called Al-louez Bay after one of the early Jesuits. A reference to



the maps prefixed to this brief being a true representation of the large exhibits, will make this description and the true character of the premises clear. We believe the interstate boundary in the application of the general description given in the constitution should have run south of Big Island if these are waters of the river and that the same can only be said to be north of Big Island upon the theory that they are the waters of the lake to which the designation of center line applies. The location north of the island has been too long acquiesced in to now be the subject of controversy. St. Louis Bay between Big Island and the Minnesota shore is from two thousand (2,000) to three thousand (3,000) feet wide. Reference may here be made to Exhibits 3, 4, 5, 6, 9, 11 and 12, and to the evidence of W. B. Patton, pp. 109-110 and 121-124 of transcript.

Township Forty-nine (49) North of Range Fourteen (14) was surveyed by the United States in 1854, the survey and plat being approved on July 17 of that year. (See plaintiff's Exhibit 3.)

Township Forty-nine (49), Range Fifteen (15), was surveyed and platted in 1857, the plats thereof being approved that year. (See plaintiff's Exhibits 4 and 5.)

The defendant Whiteside owns the greater part of Big Island and the defendant Alexander owns a small parcel thereof in Lot Two (2), Section Twenty-four (24), Township Forty-nine (49), Range Fifteen (15), description of which is shown by the deed, plaintiff's Exhibit 2. It is doubtful if he has any interest in the controversy and it was stipulated that his interest should be determined by the decision as to the defendant Whiteside. A part of the other lands of the defendant Whiteside here involved was entered in 1859, patented in 1860, and a part of them was entered in 1867 and patented in 1868.



The lands of the plaintiff were patented in 1860 and these parties are respectively the owners of these lands through a chain of title back to these patents. It is stipulated that they own the same in fee with all the riparian rights now or heretofore appurtenant thereto, unless divested of any thereof by the possession of the defendant Tallas. (See plaintiff's Exhibit 1.)

Plaintiff's lands are in Minnesota. Defendant Whiteside's lands on Big Island are in Wisconsin. There grew up in the bay between the lands of the plaintiff and Defendant Whiteside subsequent to the survey and patent thereof, which fact is admitted in the pleadings, a small, irregularly shaped low, marshy island, mostly on the Minnesota side of the middle line of this body or channel of water. This island, as it was alleged and admitted, was not in existence at the time the government surveyed the other lands and conveyed the same by patent. The evidence shows that it was often overflowed, changed in form and when the government improved the channel it cut through the same without objection by anybody and without compensating anybody, treating it as submerged land the same as other parts of the bed of the bay—dredged out the main part thereof in the conduct of the improvements which it was making in these waters, leaving a small part or prong on the northerly side and a small part on the southerly side, the latter having since entirely disappeared. This work of the government consisted in improving the navigable channel by dredging a wider and deeper channel through the center of these waters in aid of navigation, the same crossing and re-crossing the tortuous line of deepest water theretofore existing through the bay. In the making of this improvement the government filled over on to the little prong of this island that was left on the Minnesota side and also deposited dredging material to the westerly so that they completely



filled up the original deep water line for some distance for the protection of the improved course and filled over into the same elsewhere so that the original deepest channel in these waters in front of the plaintiff's property is no longer navigable except that small boats might run up into the open water for a little way, having to cross property not belonging to plaintiff to do so.

(See plaintiff's Exhibit 9, also the testimony of G. A. Taylor, pages 86-90 of the transcript, also testimony of William E. Richardson, pages 106-109 and 110-116 of the transcript, also finding of the court, pages 163-164 of the transcript.)

These improvements made by the general government were made pursuant to the authority of Congress and in the exercise of the paramount power reserved by the government over navigable waters. The government established dock lines both on the Minnesota and Wisconsin sides and substantially runs through the center of the bay. The surveys and maps including the dock lines and the proposed improvement were approved by Secretary of War Root November 17, 1899, and the work of improvement was carried on up to 1902, when it was completed. (See Exhibits 6, 7 and 9, and testimony of G. A. Taylor on page 86 of transcript.)

The government deposited dredging material over and upon the prong of this small island which remained on the Minnesota side and also to the westward, practically obliterating the form of the island and making a long reef along the northerly side of the dredged channel upon which has since accumulated a growth of brush. (See Exhibit 9. Also testimony of Taylor and Richardson referred to supra.)

The main value of the shore lands is by reason of the riparian rights and privileges incident to their being



upon navigable water and the most valuable of these is the right to wharf out directly in front thereof to the navigable and navigated waters. (See testimony of William E. Richardson, p. 118 Transcript.)

The defendant Tallas had been a squatter on this little low, marshy island and had a cabin thereon at the time of the government improvement. The cabin was afterwards destroyed by fire. It apparently had stood upon posts down near the shore. Afterwards he constructed another cabin further back on the island. It appears by the pleadings of defendant Tallas and defendant Whiteside that defendant Whiteside challenged Tallas's occupancy of this island in an action brought in Wisconsin which has been pending several years and never brought to trial. Nothing further appeared in the trial concerning it except what is found in the pleadings. Tallas simply testified that he was in possession, claiming to own. The small island in question was never surveyed and never treated, either by the government or state, as land.

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The defendant Whiteside claims that he owns the bed of these waters adjacent to Big Island and that such ownership extends to the interstate boundary, and that such interstate boundary does not follow the middle of this bay or channel of water in fact, but follows the sinuous thread of deepest water in that bay or channel, wherever it was at the time of the admission of Wisconsin unless changed gradually by nature, and that as this island made its appearance in the bay southerly of that line of deepest water, as he claims it, that it therefore grew on land belonging to him, and in order to support this claim he asserts that all of these bays and all of these waters are the St. Louis River *clear down to the strait or entry between Minnesota and Wisconsin Points*. Counsel appar



ently conceive that such claim could better be sustained if the water at this place were deemed a river rather than a bay of the lake for two reasons, first, because it is claimed that under the Wisconsin decisions it is held that a shore owner owns the bed to the thread of a stream, and second, that under these and other decisions the sinuous thread of deepest water in a navigable river is deemed the middle of the channel; and the defendant Whiteside, claiming that this sinuous thread was the interstate boundary, and must always be so, and that he owns to that boundary, therefore that he has the right to straddle the improved navigable and navigated channel through the actual middle of these waters and to intervene between the plaintiff's shore lands and such water and prevent the plaintiff's access thereto.

The plaintiff claims upon the uncontrovertible evidence that these are the waters of the lake; that they constitute an arm or bay of the lake; that the owners of lands abutting thereon own only to the shore; that the title to the bed is in the states in sovereign capacity in trust; that the entire waters at this place are the boundary waters; that the purpose of making them such was that each state and the citizens of each state should have access to the navigable water. That the true boundary line is in the middle; that the island which grew upon the bed bore no more definite character than any of the subaqueous lands; that the variation of the actual middle line, if at all applicable to the bay in order to follow the thread of deepest water, is not necessarily a permanent interstate line and is only assumed for the purpose of protecting for the time being the access of the owners upon either side to the navigable water. That there was always reserved in the government the paramount power to improve the waters in aid of navigation and commerce, and that when the government, in pursuance of that



power, established these dock lines and improved the ship channel along the actual middle line, that there was no longer any reason to vary from that line and treat a line which was not the middle line as such; and that the plaintiff and the defendant each have the right of access in front of their premises to the navigable and navigated water—that is, to the improved channel, that is, to the actual middle line; and that neither has the right at any point because of the original sinuous thread of deepest water to now intervene and prevent the other from access to the navigable and improved channel. This the plaintiff claims gives full effect to the purpose of the designation of these waters as a boundary and preserves the rights of the owners upon both shores, which it was intended they should have, and concerns the public interests.

The defendant at times not only claims these waters to be those of the river, but seems to claim that the water left to the northward when this island arose is one of the channels of the river and treats it as the main channel, in support of the claim that the interstate boundary line is there. If Spirit Lake, St. Louis Bay, Pokegama Bay, Superior Bay, and all the other bays are really the St. Louis River, to some part of which should be applied the constitutional designation of main channel of said river, then the most that could be claimed is that the water between Big Island and the Minnesota shore constituted that channel instead of the water south of Big Island. This little island, most of which has been scooped away by the government, was not in existence at that time. Counsel for Appellant also refer to the improvement in these waters as an artificial channel as though a canal had been cut to which we proposed to transfer the dividing line from the natural body of water. Such language is misleading and not apt.

The government has simply improved this channel



of water—the main channel of it is a river—the middle line if it is a bay—by deepening the same through the middle of it in aid of navigation and commerce. States and citizens always knew that the power to do this was reserved in the general government. The construction of appellant defeats the very purpose for which such waters were made the interstate boundary and defeats the very purpose for which such reservation of power was made by the Federal government.

The plaintiff is a resident of Kentucky. The defendant is a resident of Minnesota. The plaintiff's lands are in Minnesota. The plaintiff brought this suit to have determined by the court the extent of his riparian rights and privileges in accordance with these claims, and the trial court so determined. Involved in defendant's claims there is the claim that the court has no jurisdiction. The plaintiff claims that the court has both jurisdiction of the subject matter and of the parties, and believes that this action was brought in the right court. If the appellant's objections to the jurisdiction of the court are well founded and his arguments can be pursued to a logical conclusion, then he must claim that the plaintiff is without any court to which he could go for such determination.

It is apparent and as well a matter of common knowledge that the determination of the rights of these parties in accordance with the contention of the plaintiff is of the greatest importance to the City of Duluth and the State of Minnesota. If a sinuous line is to be run across the Minnesota docks in accordance with some of the allegations contained in the answers in this case upon the testimony of some ancient inhabitant as to where he thinks he remembers the thread of deepest waters to have been in these bays fifty years ago, serious controversies will ensue.



It is equally apparent that a determination of this cause in accordance with the contention of the petitioner will work an absolutely just determination to all parties and leave no room for future controversies.

### ARGUMENT.

Without stopping at this time to discuss as a separate topic the question of jurisdiction, we prefer to proceed with our affirmative argument in support of the decree of the Circuit (District) Court of Minnesota, and in support of the petition.

If the decision was right it should be sustained, whether upon grounds stated by the trial court or not stated.

The argument and authorities following are addressed and submitted to the court to sustain the proposition that whether these waters be those of a lake, bay or stream, the title of the owners of the abutting lands stops at the shore with rights incidental to the ownership of the shore but not of the bed,—to reach out by their improvements to the established dock line and have access to the navigable and navigated channel whether in its original form or as improved by the government, between the banks or shores and between the dock lines, undisturbed by the existence or location of any state boundary line in the bed. That the states own the bed in a sovereign capacity as an inalienable trust, as a support for the waters above, which are under the supervision and control of the Federal Government, and that such an island as the one described is so held as the rest of the bed, subject to the same treatment by the general government as the other sub-aqueous lands. That no greater rights in fact attach to the ownership of the Wisconsin shore lands than to those of Minnesota. And,



further, that in fact under the pleadings and evidence and upon the authorities applicable thereto, these waters are part and parcel of Lake Superior and the little island is therefore in the waters of Lake Superior, and the status of the parties must be determined by the authorities applicable to the waters of the Great Lakes and the arms and bays and inlets thereof and other navigable lakes, as to which the authorities are uniform and in harmony with the above contention, even in states which hold to the contrary as to the title to the beds of streams,

That any technical or theoretical state boundary in the bed of these waters will not abridge the plaintiff's rights to prevent his enjoyment of access to the navigable and navigated water and to reclaim and improve for that purpose out as far as the dock line.

That such interstate boundary is impossible of any definite location except in the middle of these waters, which is between the established dock lines and in the course improved by the Government and should be held to be so located and the Trial Court sustained in that conclusion.

We now present for the consideration of the court certain propositions and authorities in support of plaintiff's bill in equity in several of which the hypothesis that the waters at the locus in quo are those of a stream is not excluded.

#### I.

WHERE A NAVIGABLE STREAM IS MADE THE BOUNDARY BETWEEN STATES THE BOUNDARY LINE HAS BEEN HELD TO RUN THROUGH THE CENTER OF THE MAIN NAVIGABLE AND NAVIGATED CHANNEL. THE PURPOSE OF MAKING SUCH STREAMS INTERSTATE BOUNDARIES IS



TO GIVE EACH STATE AND THE CITIZENS  
THEREOF FULL ACCESS TO THE NAVIGABLE  
WATERS AND CHANNEL OF THE STREAM SO  
THAT THEY CANNOT BE CUT OFF THEREFROM.

Iowa v. Illinois, 147 U. S. 1; Book 37 L. Ed. 55,  
Buttenuth v. Bridge Co., 133 Ill. 535,  
Handly's Lessees v. Anthony, 18 U. S. (Wheat)  
374; Book 5 L. Ed. 113;  
Franzini v. Layland, 120 Wis. 72; s. c. 97 N. W.  
Rep. 499.  
Indiana v. Kentucky, 136 U. S. 1; Book 34 L.  
Ed. 329;  
Missouri v. Kentucky, 78 U. S. 11; Book 20 L.  
Ed. 116;

Now in the case of Iowa v. Illinois, the court held that the "middle of the main channel of the river," "mid-channel," and "middle of the thread of the channel," were used interchangeably and bore the same meaning. The court said:

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established at the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is therefore laid down in all of the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states, up to which each state will on its side exercise jurisdiction."

The court remarks at length and quotes from leading authorities on international law in support of the conclusion above stated and says:



"It is the free navigation of a river when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called 'nature's pathway,' that states demand shall be secured to them. When a river navigable in fact is taken or agreed upon as the boundary between two states or nations, the utility of the main channel or what is the same thing, the navigable part of the river, is too great to admit a supposition that either state intended to surrender to the state or nation occupying the opposite shore the whole of the principal channel or highway for vessels and thus debar its own vessels the right of passing to and fro for purposes of defense and commerce. That would be to surrender all, or at least the most valuable part of such river boundary for the purposes of commerce or other purposes deemed of great value to independent states or nations."

This case shows the reason why navigable streams are so often made boundaries between jurisdictions, and is a strong holding in favor of the indestructible right of each jurisdiction to enjoy the facilities of navigation and to extend out to the center of the main channel of commerce. It certainly seems that it is but a short distance from such a determination to the conclusion that where, in the exercise of the paramount control reserved in the government over such streams for the purpose of improving navigation and in furtherance of commerce within the same banks or boundaries of the river, the actual navigable and navigated channel is changed by turning a sinuous course thereof into a more practical and straight one and along the actual middle thereof, that in obedience to the same controlling principles referred to above, the jurisdiction of such respective commonwealths would reach to such improved channel and not beyond.

No principle of avulsion is involved. No principle of the shifting of the whole prior channel of the stream into a new channel is involved. We take it there can be no such a thing as an avulsion within the banks of a



stream and know of no authority holding the change of the course of the deep water of the stream within the same banks to be in any sense an avulsion. The decision in this case by the Circuit Court of Appeals seems it is true to treat the government improvement as an avulsion but without authority. If the line of deepest water is shifted by the exercise of the reserved paramount power of the government, why should it be held that the states either were formed or the boundaries thereof fixed or adopted with any other purpose than that they and their citizens should always enjoy the rights incident to the boundary navigable stream? Where is there anything to indicate that either the states or the general government intended to abrogate that privilege, the preservation of which the court in the above case said is "the subject of paramount interest?"

In *Handly's Lessees v. Anthony, Supra*, it was held that the boundary of the State of Kentucky extends only to low water mark on the western or northwestern side of the Ohio River, and the court said:

"When a great river is the boundary between two nations or states, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream; but when, as in this case, one state is the original proprietor and grants the territory on one side only, it retains the river within its own domain and the newly created state extends to the river only. *The river, however, is the boundary.*"

The court quotes from Vattel the statement:

"Nothing is more natural than to take a river for a boundary when a state is established on its borders."

This case emphasized the fact that it is the river that is the boundary and in which boundary waters, unless



otherwise limited, the respective states and their citizens enjoy the rights and privileges that are appurtenant thereto. The court further said:

"Wherever the river is the boundary between states, it is the main, the permanent river which constitutes the boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark."

If, then, the main navigated and navigable channel of the river is to be deemed the real boundary channel, as held in the Iowa-Illinois case, what is there left but to say that the permanent main navigable and navigated channel continues to be the state boundary, and why should it cease to continue to be such boundary when improved and made the better for navigation purposes by the exercise of the reserve paramount power of the General Government?

The case of *Indiana v. Kentucky, Supra*, arose over the question as to whether Green River Island was in the State or Kentucky or Indiana. The question was of importance between private owners, because if it was within the State of Indiana the title would come from the General Government, the boundary resting upon the cession from the State of Virginia; whereas, if it was not within the State of Indiana, it did not pass by the cession of Virginia to the General Government and hence the claimant had not title to it. The court reiterated the doctrine laid down in *Handly's Lessees v. Anthony, Supra*, quoting extensively from that case, and held that the northerly boundary of the State of Kentucky extended to low water mark on the north bank of the river so as not to leave a strip of land on the northerly side of the river between high and low water mark, within the State of Kentucky,



but so as to leave the lands in the State of Indiana to reach the river; in other words, to the river at low water mark, so that the state and its citizens would always have the privileges of the river. This was notwithstanding the boundary line was on the river's edge. There were other matters involved in the case, determinative of it, resting upon evidence, among others, the acquiescence by the State of Indiana for over seventy years after it was admitted into the Union in the exercise of jurisdiction over the island by the State of Kentucky, the holding being that the river included the channel which was on the north side of this island and hence that the boundary of the State of Kentucky extended to the north side of that channel.

In the case of *Missouri v. Kentucky, Supra*, in the controversy over Wolf Island, the question was, where did the boundary between the states run?

Under the treaty between the United States and France of April 30, 1803, the definite boundary was not fixed but it was provided as follows:

"The Province of Louisiana, with the same extent that it now has in the hands of Spain and that it had when the French possessed it,"

and in the treaty of the United States with Spain of October 27, 1795, the western boundary which separates it from the Spanish colony of Louisiana was said to be "in the middle of the channel or the bed of the River Mississippi."

The evidence in the case was examined and it was found that the original main channel of the river ran west of Wolf Island, although there was a small channel running through the State of Kentucky east of the island. In after years, by the operation of the washing away of



certain points, the river cast itself into the Kentucky channel on the east side of the island and the same operated to make that the principal channel of the river. The court held, upon an examination of the evidence, that the original channel of the river was west of Wolf Island and was there at the time of the execution of the treaties, and the gist of the decision is to hold that to be the boundary line between the states.

A considerable other evidence was examined and weight given thereto, showing acquiescence on the part of the two states in that line as the boundary, and exercise of sovereign jurisdiction by the State of Kentucky over the island.

In so far as the decision has any effect upon the questions under consideration, it is to hold that the boundary, as fixed between the states by the treaties, remained at that point notwithstanding the river subsequently was changed so as to constitute another and shorter channel the main channel of the river.

We do not think the decision controlling on any question involved in the present consideration. It does not in so many words say that the river suddenly changed its channel, and yet it is apparent that it must in a measure have done so, leaving the case to follow that line of decisions resting upon the fact of avulsion. It does not determine the question as to a sinuous course of deepest water in a channel being forever to be the real boundary line between the states.

In the case of *Franzini v. Layland*, *Supra*, the court on page 501 of the decision as reported in the *Northwestern Reporter*, states the following:

"Appellants' counsel, conceding for the argument that the western boundary of this state is west of Lot 1 aforesaid, insist that it is midway between



the westerly meander line of said lot and the Minnesota shore. On that theory they easily establish the *locus in quo* without this state, it being 1,150 feet from such meander line and only 900 feet from such shore. In that counsel start with a false premise; therefore the conclusion is necessarily wrong. The boundary line in question is not the center line of the Mississippi River, measuring from shore to shore, but is the center line of the main channel of the river, the navigable and navigated channel, regardless of the distance thereof from either shore. It may be very near the Minnesota shore at some points, and very near the Wisconsin shore at others, according as the deep-water pathway used for steamboat navigation varies. *It is not referable necessarily to the condition of the channel at the time the state was admitted into the Union.* It is a shifting line, subject, however, to property rights, the idea embodied in the enabling act permitting Wisconsin to come into the Union as a state, being that there shall be for all time preserved within its boundary one-half of the main navigable channel of the river. This has been a subject of much consideration by the courts in years past and there is nothing in respect thereto left to be settled."

There are other matters in this case to be considered later but as relates to this subject of state boundaries in navigable streams, this decision, in giving full effect to the main purpose of adopting such streams as interstate boundaries, in giving effect to such purposes as declared forcefully by the Supreme Court of the United States, is finally determinative in that state of the question that the state boundary in such a case is not a fixed but a shifting one and that it follows the center of the main navigable and navigated channel as the same exists from time to time, and not as fixed forever by the condition at the time the state was admitted into the Union. That being so, nothing more is needed to decide the question that such is the fact when the navigable and navigated channel within the banks of the original boundary channel is changed or modified by improvements made in the



aid of navigation by the General Government in the exercise of that absolute and paramount power whereby it controls navigation and commerce on these rivers. If this is not true, then the main purpose sought to be subserved by the adoption of such streams as interstate boundaries has been defeated by the exercise of that very power which was retained in the Federal Government to improve the same and make the same more effective.

## II.

UPON THE ADMISSION INTO THE UNION OF STATES CARVED OUT OF THIS NORTHWEST TERRITORY, UNDER THE DOCTRINE OF THE SUPREME COURT OF THE UNITED STATES AND AS WELL OF THE COURTS OF WISCONSIN AND MINNESOTA, THE TITLE TO THE BEDS OF THE NAVIGABLE STREAMS AND LAKES VESTED IN THE STATES, TO THE BOUNDARY LINES THEREOF, WHICH TITLE IS NOT A PROPRIETARY ONE, BUT A SOVEREIGN TITLE HELD BY THE STATES IN AN INALIENABLE TRUST FOR THE BENEFIT OF THE PUBLIC, AND UNTIL THE FORMATION OF SUCH STATES AND THEIR ADMISSION INTO THE UNION, SUCH TITLE WAS HELD BY THE FEDERAL GOVERNMENT IN TRUST FOR THE FUTURE STATES.

St. P. & P. Ry. Co. v. Schurmeier, 7 Wall. 272  
(74 U. S.) Book 19 L. Ed. 74;

Illinois Cent. Ry. Co. v. Illinois, 146 U. S. 387;  
Book 36 L. Ed. 1018;

Knight v. United Land Assn. 142 U. S. 161;  
Book 35 L. Ed. 974;

Pollard v. Hagen, 3 How. 212, Book 11 L. Ed.  
565;



- Martin v. Waddell, 41 U. S. 367; Book 10 L. Ed. 997;  
 Packer v. Bird, 137 U. S. 661; Book 34 L. Ed. 819;  
 Rossmiller v. State, 114 Wis., 169; 89 N. W. Rep. 839;  
 Barney v. Keokuk, 94 U. S. 324; Book 24, L. Ed. 224;  
 McLennan v. Prentice, 85 Wis., 427;  
 Hicks Atty. Gen. ex rel Askew v. Smith, 109 Wis. 532; 85 N. W. Rep. 512;  
 Hanford v. St. P. & D. Ry. Co., 43 Minn. 104;  
 Lamprey v. State, 52 Minn. 181;  
 Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59;  
 Laverich v. Mobile, 110 Fed 170;  
 State v. Venice of America Land Co., 125 N. W. Rep. 775 (No. 6);  
 Broward v. Mabry, 50 So. Rep. (Fla.) 826.

In the case of *Railway Co. v. Schurmeier*, *Supra*, the court refers to the views of Chancellor Kent wherein that distinguished commentator promulgates the doctrine that grants of lands bounded on rivers, above the tide water, carry the exclusive right and title of the grantee to the center of the stream, unless there is an express reservation in the grant; and that the public have, in cases where the river is navigable, an easement or right of passage, and the court says that decided cases of the highest authority confirm that doctrine and that it is doubtless correct in most or all jurisdictions where the rules of the common law prevail as understood in the parent country; that such rules generally have been adopted in this country as applied to rivers not navigable, when named in a grant or deed as a boundary to land, and that substantially the same rules are adopted by Congress as applied to streams not navigable, but that many acts of Congress, some of which are referred to in the opinion,



have provided that all navigable rivers or streams in the territory of the United States should be deemed to be and remain public highways. The court further says:

"Irrespective of the acts of Congress, it should be remarked that navigable waters, not affected by the ebb and flow of the tide, such as the Great Lakes and the Mississippi River, were unknown to courts and jurists when the rules of the common law were ordained; and even when the learned commentaries were written, to which reference is made, it was still the settled doctrine of this court that the admiralty had no jurisdiction except where the tide ebbed and flowed,"

referring to the case of *The Jefferson*, 10 Wheat. 428, and *The Genesee Chief*, 12 How. 456, and others. The court then said:

"Extended discussion of that topic, however, is unnecessary as the court decides to place the decision in this case upon the several acts of Congress making provision for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys. Such a reservation in the Acts of Congress, providing for the survey and sale of such lands, must have the same effect as it would be entitled to receive if it were incorporated into the patent, especially as there is nothing in the field notes, nor in the official plat or patent, inconsistent with that explicit reservation. Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words 'navigable' and 'not navigable' in that sense as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide waters and in which there were no salt water streams. Viewed in the light of these considerations, the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not



navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering upon the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways."

This case limited the private grants bordering on a stream to the stream's edge, and left the title to the bed of such stream to fall to the state, as declared more fully in other cases,

The case of *Illinois Cent. Ry. Co. v. Illinois, Supra*, covers many questions but in the question involved in the above proposition, the court says:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several states, belong to the respective state within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation, so far as may be necessary for the regulation of commerce with foreign nations and among the states. The same doctrine is in this country held to be applicable to lands covered by fresh water and the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all of the general characteristics of open seas, except in the freshness of their water and in the absence of the ebb and flow of the tide."

The case then goes on to break down the distinction between waters in which the tide ebbs and flows and in which it does not, and to wipe out that test as a criterion for determining whether the ownership of the beds of waters shall be in the public or in the shore owner, and holds that in view of our Great Lakes and great rivers,



navigable for hundreds of miles, if such a distinction is made on account of the tide, it is arbitrary, without any foundation in reason and inconsistent with reason. The court shows clearly why and how the doctrine of public and private waters, based on the ebb and flow of the tide, or the absence thereof, grew up in England, where the physical conditions were widely different, the rivers being small and inconsequential emptying into the arms of the sea wherein the tide did ebb and flow, and the court holds that the same doctrine as to dominion and sovereignty over and ownership of lands under the navigable waters and the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under the tide waters on the borders of the sea, and that the lands are held by the same right in the one class as in the other and subject to the same trusts and limitations.

On pages 1042 and 1043 in the Lawyers' Edition Volume, the court said that the title which the state holds to the land under the waters of the Great Lakes is different in character from that which the state holds in lands intended for sale; that it is different in character from the title which the United States holds in the public lands which are open to pre-emption and sale; that it is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein, freed from the obstruction or interference of private parties. The court goes on to speak of the purposes for which parties may be allowed to use the lands under the waters, as for instance, wharfing out &c. in aid of or for convenience in navigation, and of the abdication on the part of the state, to private parties, of such rights and privileges, but contrasts this with the doctrine of abdication on the part of the states of the general control over the lands under the navigable waters, such allowance, it holds, being not



inconsistent with the exercise of that trust which requires the government of the state to preserve such waters to the public use, which trust, the court says, cannot be relinquished by a transfer of the property. The court further says:

"The control of the state, for the purposes of the trust, can never be lost, except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

The court then, speaking of the fact that sometimes language used by the court in opinions is given too broad an interpretation, because it should be considered only as related to the particular facts, says:

"A grant of all of the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation and use of waters \* \* \* than it can abdicate its police powers in the administration of government and the preservation of the peace."

In *Knight v. United Land Ass'n., Supra*, on page 982 of the L. Ed. Volume, and on page 183 of the original volume, the court said:

"It is the settled rule of law in this court that absolute property in and dominion and sovereignty over soils under the tide waters in the original states, were reserved to the several states and that the new



states admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possessed, within their respective boundaries."

In *Packer v. Bird*, *Supra*, the contention was over an island in the Sacramento River assumed to be navigable at that point. Mr. Justice Field in the decision said that it is undoubtedly the rule of common law that the title of owners of lands bordering on rivers above the ebb and flow of the tide, extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of the owners is limited to high water mark and that the title in such case, in this country, below that mark, is vested in the state. That private ownership of the soils under them is deemed inconsistent with the interest of the public at large to their uses for the purposes of commerce; that those rivers in this country are regarded as public, navigable rivers in law which are navigable in fact, and as such, in the case of *Daniel Ball*, 10 Wall 557-563, they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel for commerce are conducted in the customary modes of trade and travel on water. That the same reasons exist therefor in this country for the exclusion of the right of private ownership over the soil under navigable waters, when they are susceptible of being used as highways for commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. The court refers to the early cases arising on the Atlantic Coast in this country and to their following naturally the English common law, and refers to the cases in the West where there is more conflict in the states, many of which have departed from the common law, in so far as the same makes the ebb and flow of the tide the criterion for the determination of navigability.



The court then refers to the case of *The Genesee Chief*, 12 How, 443 and *Barney v. Keokuk*, 94 U. S. 324, and says:

"The legislation of Congress for the survey of public lands recognizes the general rule as to the public interest in the waters of navigable streams without reference to the existence or absence of the tide in them. As early as 1796, in an act providing for the sale of such lands for the territory northwest of the River Ohio and above the mouth of the Kentucky River, Congress declared that all navigable rivers within the territory to be disposed of by virtue of the act, 'shall be deemed to be and remain public highways,' and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall be common to both."

The case declares that the courts of the United States will construe the grants of the General Government without reference to the rules of construction adopted by the states for their grants, leaving it to be determined by the states as to what incidents or rights attach to the ownership of property conveyed by the government, subject to the condition that their rules do not impair the efficiency of the grants or contravene the public rights in the waters.

With the criterion of the tide out of the way then, under such authorities as this, the actual title of the grantee of the shore lands would end at the shore and the bed vest in the state, in trust for the public at large.

In *Ross v. State*, *Supra*, the questions involved were respecting the title to the beds of navigable lakes within the State of Wisconsin. The question arose over the shipping of ice outside of the state, contrary to certain statutes of that state, without license from the state. Mr. Justice Marshall, expressing the unanimous decision



of the court in his opinion, held that no property right was acquired by the state by the mere legislative declaration that ice formed upon meandered lakes within the boundaries of the state belongs to the state as property; that under our constitutional system, the legislature has no such power as that of changing the ownership of power by its mere fiat. He said:

"It has not been supposed that the state could deal with public waters, or with any other thing held upon a like trust to that of such waters, as the proprietor thereof,—that any such thing could be treated in any respect as the absolute property of the state, and used for purposes of revenue,"

and said that after the most painstaking investigation the court could give with a view of possibly sustaining the act in question, that it was unable to discover anything in reason or authority to support the idea of state ownership of ice formed on public waters. The court on page 643 of the opinion as reported in the 89 N. E. Rep., said:

"We are safe in saying that no court has more definitely declared that the interest of the state in its navigable waters and the lands under them, and all the incidents thereof, are purely of a trust character, the beneficiaries on the plane of perfect equality being the whole people of the state, than this court has done in recent years. In doing that it is believed the people have been rescued from all danger of losing any of those common rights by the invasion thereof by the claims of private owners, if such danger ever existed. That judicial service would be of little value if mere state ownership for the preservation of common rights were so perverted as to support a claim of state ownership in hostility to such rights, a principle which, in the possibilities of its development, might lead to a serious impairment, if not utter ruin of a most important trust \* \* \* This court has repeatedly said that the navigable waters of the state have substantially the incidents of tidal waters at common law; that the title to the beds of



such waters was reserved for the state by the Ordinance of 1787 and vested in it at the instant it was admitted into the Union, to preserve the public character of such waters with all such incidents; and that the state never has and never can constitutionally impair the trust," citing many cases.

Further on, referring to the case of *Prieve v. Improvement Co.*, 93 Wis. 534, and 103 Wis. 548, the court says:

"It was held in effect that the state has no such interest in the beds of navigable lakes that it can treat the same as a subject for bargain and sale or grant the same away to private owners under the guise of police power, or otherwise; that it is a mere trustee of the title thereto, under a trust created before the state was formed, to which it was appointed as trustee by its admission into the Union."

We shall have occasion to refer to the case of *Barney v. Keokuk* in other connections, but we refer to it here for the reason that the court said in the decision that it appeared to be the settled law of Iowa that the title of the riparian proprietors on the banks of the Mississippi extends only to high water mark, and the shore, between high and low water mark, as well as the bed of the river, belongs to the state, and this the Federal Supreme Court declared in its opinion, following this court, and said:

"This is also the common law of England with regard to navigable waters, although in England no waters are deemed to be navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so, and especially is this true with regard to the Mississippi and its branches."

We refer to this case here too for the reason that the court held that the grants from the Federal Government



on navigable streams and waters ended at the shore, although on account of the confusion of holdings in the states, due to the earlier decisions following the English common law tide-water doctrine and on which rules of property may have been built up, the court deemed it best to leave to the states the determination of what rights should attach to riparian ownership by state concession, etc., but the grant from the government ends at high water mark, as declared by this decision. We here quote from the opinion of the court on page 228 of the decision as found in the Lawyers' Edition report:

"It is generally conceded that the riparian title attaches to subsequent accretions to the land, effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the Crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide-waters, found in the monuments of common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence, it laid the foundation in many states, of doctrines with regard to the ownership of the soil in navigable waters above tide-water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to de-



termine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, *Pollard v. Hagen*, *Supra*, and *Goodtitle v. Kibbe*, 9 How. 471. These cases related to tide-water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court in the case of *Genesee Chief v. Fitzhugh*, 12 How. 443 has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

In the case of *McLennan v. Prentice*, *Supra*, the contention arose over the title to property upon the shore of Chequamegon Bay. The court, on page 442, uses the following language:

"The question whether the lands or lots lying under the shoal water of the bay, and between the bank and navigable water, are the subject of private ownership, so that they can be conveyed in fee or otherwise, is a very important one, and has recently been much discussed, as well as the rights of riparian owners over the same and out to navigable water. In the case of *Diedrich v. N. W. U. R. Co.*, 42 Wis. 248, it was held that 'a riparian owner upon a natural lake or pond takes only to the natural shore or ordinary low water mark thereof, and that distinguished from appropriation and occupation of the soil under the water, a riparian owner upon navigable water has a right, (unless prohibited by local law) to construct in shoal water in front of his land, proper wharves or piers in aid of navigation, and, at his peril of obstructing it, through the water far enough to reach actually navigable water; that such riparian



rights proper rest upon *title to the bank* and are the same whether the riparian owner owns the soil under the water or not; that the general right of appropriating and occupying the soil under the water, when it exists, is not properly a riparian right, and rests not upon the title to the bank only, but more directly upon title to the soil under the water,' and subject to these and certain rights of protection of the land against the water, 'any extension of possession or intrusion into the water beyond the natural shore whether by the riparian owner or a stranger, without express and competent grant from the public, vests no title in the person who makes it.' "

The court further said that the state is the owner in fee of all of the lands under navigable waters in the Great Lakes, but in trust only for the public uses and purposes of navigation and fishing; that they are subject to state regulation and control under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. On page 444 the court said:

"It is plain that no grant by the state, for purely private purposes, of such lands, could operate to impair or defeat the previously acquired rights of the riparian owner, for the state has no right to make such a grant. The right which the state holds in these lands is in virtue of its sovereignty and in trust for the public purposes of navigation and fishing. The state has no proprietary interest in them, and cannot abdicate its trust in relation to them and, while it may make a grant of them for public purposes, it may not make an irrevocable one, and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation."

In the case of *Hicks Atty. Gen. ex rel Askew v. Smith*, *Supra*, Judge Winslow in deciding the case said:

"Lake Monona is a meandered lake, navigable in fact. The title to its bed is in the state in trust for



legitimate public uses, such as fishing, navigation and the like; and the state cannot convey it away for private use, nor can it abdicate the trust."

It will be seen by an examination of the Wisconsin cases, a more full review of which is hereinafter given with relation to another proposition, that no distinction is made in that state as to the sovereign character of the title of the state in the beds of lakes and in the beds of navigable rivers, nor does there appear any reason why any such distinction should be made. Whatever else is granted to an owner on a bank of a navigable river (if anything) or on the shore of a navigable lake (if anything) is by the way of state concession in the nature of riparian rights, through the decisions of the courts.

In the State of Minnesota the doctrine is well settled as to the sovereign character of the title of the state in the beds of lakes and streams. No distinction is made as to this title under navigable waters nor as to the rights of riparian owners on the bank or shore of such waters. Whether such waters consist of lakes or streams, the title of the shore owner stops at least at low water mark and the title to the beds of the lakes or streams is in the state in its sovereign capacity.

In the case of *Hanford v. St. P. & D. Ry. Co., Supra*, the court said in its opinion on re-argument on pages 111 and 112:

"In this state, the title of the proprietor of lands abutting upon navigable waters, extends to low water mark. The bed of the stream or body of water below low water mark being held by the states, not in the sense of an ordinary, absolute proprietor, but in its sovereign governmental capacity for the common public use."



In the case of *Lamprey v. State, Supra*, Mr. Justice Mitchell says on page 197 of the opinion:

"The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions are self evident and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams,"

and on page 198 the court says:

"Our conclusion, therefore, is that upon both principle and authority, as well as consideration of public policy, the common law is that the same rules as to riparian rights which apply to streams apply also to lakes, or other bodies of still waters. In this state we have adopted the common law on the subject of waters, with certain modifications suited to the difference in conditions between this country and England, the principal of which are that navigability in *fact* and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use."

And, further the court said that the riparian proprietor held his title by reason of the ownership of the shore and not of the bed and that his title stopped at the water's edge, but with certain incidental riparian rights.

In the case of *Bradshaw v. Duluth Imperial Mill Co., Supra*, on page 65 of the opinion the court said:

"It is well settled with us that the rights of the state in navigable waters and their beds are sovereign and not proprietary and are held in trust for the public as a highway and are not capable of alienation."



## III.

THE CONTROL OVER COMMERCE AND OVER THE NAVIGABLE WATERS, INCLUDING NAVIGABLE BOUNDARY STREAMS, IS RETAINED BY THE FEDERAL GOVERNMENT, AND THE POWER OF THE FEDERAL GOVERNMENT WITH RESPECT THERETO IS SUPREME, ABSOLUTE AND PARAMOUNT TO ALL OTHER POWER. SO GREAT IS THIS POWER AND TO SUCH AN UNLIMITED EXTENT IS IT EXERCISED, THAT THE TITLE TO THE BED OF THE STREAM BECOMES A SUBORDINATE MATTER.

Gibson v. United States, 166 U. S. 69; Book 41  
L. Ed. 996;

Scranton v. Wheeler, 179 U. S. 141; Book 45  
L. Ed. 126;

Stockton v. Baltimore, 32 Fed. Rep. 9;

Practically all of the decisions of the United States courts and as well of the state courts on riparian questions and questions of navigable waters, might be cited under such a proposition as this but these cases, strongly declarative of the extent of this power, are sufficient to be here pointed out.

In *Gibson v. United States, Supra*, Chief Justice Fuller said:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect to navigation created in favor of the Federal Government by the constitution."



In *Scranton v. Wheeler*, *Supra*, Mr. Justice Harlan, in speaking of this power of the Federal Government, after a review of many cases, said:

"All the cases concur in holding that the power of Congress to regulate commerce and therefore navigation is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the government does not transcend the limits established by the supreme law of the land."

Then speaking of the rule in Michigan, that the title of the riparian owners extends to the middle line of the stream, the court said:

"But it is equally well settled in that state that the rights of the riparian owner are subject to the public easement or servitude of navigation," (citing cases). "So that, whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public, navigable river, his title is not as full and complete as his title to the fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare, technical title, not at his absolute disposal as is his upland, but to



be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

These cases are referred to here because they contain a review of many cases and because they contain strong examples of the assertion of this paramount right by the government.

#### IV.

THERE IS NO REASON FOR SAYING THAT THE INTERSTATE BOUNDARY MUST FOREVER FOLLOW THE SINUOUS THREAD OF THE ORIGINAL DEEP WATER. THIS BOUNDARY IS MORE IMAGINARY THAN REAL. IT MAY, WITHIN THE BANKS, BE SHIFTING; IT IS NOT INFLEXIBLE. THE NAVIGABLE STREAM OR CHANNEL IS THE REAL AND PRACTICAL BOUNDARY UPON WHICH BOTH THE STATES AND THE CITIZENS THEREOF, THE OWNERS OF THE SHORE LANDS, AND THE PUBLIC HAVE RIGHTS. THERE IS NO REASON FOR INSISTING THAT AS TO THE LOCUS IN QUO THE STATE LINE IS ANYWHERE ELSE THAN MIDWAY BETWEEN THE SHORES. NO NEW SHORES WERE MADE BY THE EXISTENCE OF THIS LITTLE UNSURVEYED PATCH OF SWAMP LAND WHICH WE HAVE REFERRED TO AS THE LITTLE ISLAND. THIS IS A FAIR DEDUCTION FROM THE FOLLOWING CASES:

- Iowa v. Illinois, 147 U. S. 1; Book 37 L. Ed. 55;  
 Gibson v. United States, 166 U. S. 69; Book 41  
 L. Ed. 996;  
 Franzini v. Layland, 120 Wis., 72; 97 N. W. 499;  
 Handly's Lessees v. Anthony, 18 U. S. (5 Wheat)  
 374;



Nebraska v. Iowa, 143 U. S. 350; Book 36 L. Ed. 186:

See language of the court on p. 190 of above case;

Also language quoted supra from Franzini v. Layland, and from Iowa v. Illinois.

The legislative enactments provide for concurrent jurisdiction.

The boundary treaties and in fact the controlling reason of the whole course of judicial determination sustain this proposition.

The decisions with respect to avulsions and the desertion by rivers of their former channels, as found in such cases as

Missouri v. Nebraska, 196 U S.. Book 49 L. Ed. 372

State v. Muncie Pulp Co. 108 S. W. Rep. (Tenn.) 437

and kindred cases, are without force in the consideration of these questions. There can be no such thing as an avulsion within the banks of a stream. There may be accretion and erosion as to the respective banks and the location of the deep water channel within the same may be affected and to some extent changed and the most that can be claimed is that the boundary line varies with the same and keeps following the thread. As said above, we see no reason why, as between the shores in such a stream or channel as this, it should be insisted that such boundary line should forever follow the sinuous course of the deepest water. But if it must follow such a course for a time, there is no reason why it should not shift and change. There is no reason why it should be inflexible simply because it is between states any more than be-



tween individuals. One thing is sure, or else the purpose of the great mass of judicial decision is nullified, viz., that neither the state nor its citizens can be shut off from access to and enjoyment of the navigable and navigated channel.

## V.

IF THE FILUM AQUAE THROUGH SUCH CHANNEL AS THIS IS NOT TO SERVE AS A BOUNDARY LINE BETWEEN THE TRUST OWNERSHIP OF THE STATES IN THE BED, BECAUSE IT DOES NOT MARK THE THREAD OF DEEP WATER AND HENCE MIGHT POSSIBLY PREJUDICE THE CITIZENS OF ONE STATE IN THE FULL ENJOYMENT OF THEIR RIGHTS, SUCH REASON WOULD BE JUST AS POTENT TO SUSTAIN THE CONTENTION THAT SUCH LINE SHOULD FOLLOW THE DEEP WATER AND NAVIGABLE CHANNEL, AS IMPROVED BY THE GOVERNMENT WITHIN THE BANKS, AND IT IS THE LOGICAL CONCLUSION AND IN HARMONY WITH THE ADJUDICATED CASES HEREINBEFORE REFERRED TO, TO HOLD THAT WHEN THE CHANNEL OF A RIVER WHICH FORMS AN INTERSTATE BOUNDARY IS IMPROVED IN THE AID OF NAVIGATION BY THE FEDERAL GOVERNMENT, IN THE EXERCISE OF ITS PARAMOUNT POWER, AND AN IMPROVED NAVIGABLE AND NAVIGATED CHANNEL IS THUS MADE WITHIN THE BANKS OF SUCH CHANNEL OR STREAM, THE BOUNDARY LINE BETWEEN THE STATES MUST FOLLOW THE SAME.

This entails no hardship, is not fraught with any difficulty, is consistent with the purposes which induced the establishment of such rivers and streams as boundar-



ies, preserves to each state and to the citizens thereof the rights which the Supreme Court of the United States in the case of *Iowa v. Illinois*, *Supra*, said it was presumed they never intended to part with. Moreover, it may certainly be said that these states, when they came into the Union under the enabling acts referred to, and accepted these boundaries, did so subject to this power of the Federal Government and with full knowledge thereof and consent thereto, and all citizens acquiring property abutting thereon likewise acquired such property with full knowledge thereof.

In this case it should also be noted that the evidence shows that the improved channel through these waters here in question between the lands of the plaintiff and the defendant, includes the *filum aquae* and traverses practically the center of the channel all the way through.

On principle, therefore, we submit that if the said boundary line, this technical line, marking the boundary of the respective trust titles of the states in the bed, is of any importance at all, so long as it must be vested in one or the other of the states and in entirety in the two, in sovereign character and in an inalienable trust, there is no potent reason why that line, technical, imaginary and sinuous, may not be said to follow the thread of the navigable and navigated channel and to shift with it, wherever the same shifts by virtue of erosion and accretion or by virtue of improvements made by the government under the circumstances outlined.

The trial court took this view as the only just and practical solution and we submit that it is logical and the only solution that will not defeat the Congress in all of the acts, beginning with the Ordinance of 1787, and including the various acts pertaining to the state organizations and the acts authorizing the improvement of these waters and making appropriations therefor,



Counsel have cited two cases outside of avulsion cases upon which they rely to impeach the correctness of the trial court's decision, viz.,

Washington v. Oregon, 211 U. S., 127; and  
State v. Bowen, 149 Wis., 203, s. c. 135 N. W.  
494.

The former was fully discussed upon the trial of this case. The latter was decided since. The *Washington v. Oregon* case can have no such application as counsel give it, There the Columbia River had at least two big channels breaking apart some distance from the sea. There was a large body of land between. The north channel was designated in the constitutional boundary between these states. It was at that time the better and main channel, it is true, but even if it had not been, it was designated as the boundary. In time the south channel became the better and more used one. The court said the boundary must remain in the north channel; that

"whatever changes have occurred in that channel, and although the volume of water and the depth of that channel have been constantly diminishing \*  
\* \* the boundary is still in that channel, the precise line of separation being the varying center of that channel."

See Vol. 214 U. S. 205, p. 970 L. Ed. 2nd column, where the case is reported upon the application for rehearing. This the court said would be true whether the diminishing of the volume of water in the north channel resulted from processes of accretion or because of the jetties constructed by the Government into the ocean from the mouth of the river.

The court in the main opinion in this case (See 211 U. S. L. Ed. p. 120) refused to apply the doctrine of *Iowa v. Illinois* and other cases because in those cases the con-



stitutional boundary had been designated as the middle of the main channel or the middle of the river, and that for that reason in the absence of avulsion the boundary was the varying center of the channel, and further said:

"If Congress, in establishing the boundary between Washington and Oregon, had simply named the middle of the river or the center of the channel, doubtless it would be ruled that the center of the main channel, varying as it might from year to year through the processes of accretion, was the boundary between the two states."

But the north channel was designated and of course that must remain the boundary just the same as if some river other than the Columbia had been the boundary.

Here, however, in the case at bar the improved fair way is in the main channel as appellant claims it always was; in fact it is in the middle of that channel as they claim the constitution provided it should be. There is nothing in the Washington case derogatory to our conclusion. The Wisconsin case we do not deem of any persuasive force here. This court is by no means bound by it in any event. It arose upon a trifling question of prosecuting certain fishermen. The states had concurrent jurisdiction on the Mississippi as they have upon the St. Louis. The defendants were prosecuted, however, for violating certain Wisconsin statutes concerning fishing. The river had been diverted from one channel to another by certain railroad improvements although there was some water in the old channel. A question was certified up as to whether the boundary line had thereby become changed. The court said no. It was not a question in that case of shifting the fair way in the same channel, but of diverting the river to a totally different channel.

Here again let us remind the court that the term "artificial channel" is used by counsel we think unwar-



rantably and in a way tending to confusion. Let the court picture this body or channel of water, whether it be a river or not, with its high banks, and picture in its mind the snake-like thread of deepest soundings in that channel; then having in mind the established dock lines upon either side, consider the improved fair way in the middle of the channel, and between these dock lines, dismissing the idea conveyed that the government has created a new and artificial channel for these waters, and the court will then be in a position to determine whether this should not be held to be the constitutional boundary line in that channel, and whether any other line would be consistent with the purpose of placing the boundary there at all, and whether any other line would not defeat the very purpose of the Government in reserving the paramount control under which this improvement was made. We know of no evidence in the case at bar that shows where the line of deepest water was in this channel at the time of the admission of these states into the Union, although by reference to soundings shown on the maps it appears where it was at later dates.

## VI.

WHILE WE BELIEVE THE FOREGOING IS THE TRUE POLICY WITH RESPECT TO THE INTERSTATE BOUNDARY LINE RUNNING THROUGH NAVIGABLE WATERS, EVEN IF THE COURT SHOULD NOT HOLD THAT THE SAME FOLLOWS WITH THE CHANGES IN THE CHANNEL THE PRESENCE OF AN INTERSTATE BOUNDARY LINE IN SUCH NAVIGABLE RIVERS DOES NOT PRECLUDE THE CITIZENS OF A STATE FROM ACCESS TO THE NAVIGABLE AND NAVIGATED CHANNEL OF THE BOUNDARY STREAM, NOR INTERFERE IN ANY MANNER WITH OR DESTROY THE RIPARIAN RIGHTS OF THE OWNERS OF



LANDS ABUTTING ON THE RESPECTIVE BANKS OR SHORES, AMONG WHICH RIGHTS, ANCIENT AND CUSTOMARILY ENJOYED, AND INTENDED TO BE SECURED AND PRESERVED TO CITIZENS BY THE ACTS OF THE ADMISSION OF THESE STATES INTO THE UNION, AND IN FACT THE MOST IMPORTANT OF ALL THESE RIGHTS, IS THE RIGHT OF ACCESS TO THE NAVIGABLE AND NAVIGATED WATERS OF THE BOUNDARY STREAM, WHICH INCLUDES THE RIGHT TO BUILD ALL NECESSARY WHARVES AND DOCKS IN THE AID OF SUCH ENJOYMENT OR CONVENIENT TO NAVIGATION; AND A RIPARIAN OWNER ON EITHER SHORE WILL NOT BE CUT OFF FROM THESE RIGHTS BY HAVING THE OWNER OF THE OPPOSITE SHORE, CLAIMING TO OWN THE TECHNICAL AND SERVIENT TITLE TO THE STATE BOUNDARY, PUT IN BETWEEN HIM AND THE NAVIGABLE AND NAVIGATED CHANNEL.

Sullivan v. Mobile, 110 Fed., 186;

Yates v. Milwaukee, 10 Wall., 497;

Paine Lumber Co. v. United States, 55 Fed. 854;

Sage v. The Mayor, 154 N. Y., 61;

Harding v. Minneapolis &c. Ry. Co., 84 Fed., 287;

Richardson v. United States, 100 Fed. 714;

Dutton v. Strong, 1 Black, 66 U. S., 29;

Railroad Co. v. Schurmeier, 7 Wall., 273;

Packer v. Bird, 137 U. S. 661; 34 L. Ed. 819;

St. Louis v. Rutz, 138 U. S. 226; 34 L. Ed. 941;

Hardin v. Jordan, 140 U. S. 371; 35 L. Ed. 429;

Kaukauna v. Green Bay, 142 U. S. 254; 35 L. D. 1004;

Water Power Co v. Water Comm'rs 168 U. S. 349; 42 L. Ed. 497;



Atlee v. Packet Co., 21 Wall (88 U. S.) 389; 22 L. Ed. 619;

Mitchell v. Smale, 140 U. S. 406; 35 L. Ed. 442;

Whittaker v. McBride, 197 U. S. 510; 49 L. Ed. 857;

United States v. Chandler-Dunbar Co., 209 U. S. 447; 52 L. Ed. 881.

*Sullivan Timber Co. v. Mobile, Supra.* The Sullivan Timber Company had the legal title to the upland abutting on the River Mobile. They made improvements and wharves over the shore, out to the channel or navigable part of the river. The City of Mobile, claiming to own the title to the swamp or submerged lands, brought actions in ejectment on the different tracts against the Timber Company to compel their removal. The Timber Company did not claim to own the land beyond the shore, but did have title to the upland abutting thereon and they brought this suit in equity to protect their property and their occupation of the submerged land. The court said:

"There is equity in the bill in that it seeks to protect the complainant's property or proprietary rights as riparian owner from invasion or impairment and to settle and quiet the exercise and enjoyment of the same."

On page 192 the court said:

"It is now well settled that the title and rights of riparian or littoral proprietors in the shore or soil below high water mark of navigable waters, are governed by the local laws of the several states, subject to the rights granted to the United States by the Constitution \* \* \*. In the opinion of the Supreme Court of the United States in the case of *Yates v. City of Milwaukee*, 10 Wall. 497 19 L. Ed. 984, it is said the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right in the soil below high water mark, and a right to build out wharves, so far at least as to reach water really navigable."



"The court also said 'that this riparian right is property, and is valuable, although it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.' This decision has been cited with approval in several succeeding opinions by the Supreme Court."

The court then reviews various other cases and says, on page 193:

"The cases, I think, are authority for the proposition that riparian rights, when recognized as existing by the law of the state or by local usage are a valuable property. Among these rights are access to the navigable part of the river from the front of his lot by an owner whose land is bounded by or abuts on the river, and the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public."

*Yates v. Milwaukee, Supra.* The subject matter in this case is the same as in the case of *Judd v. Yates*, 18 Wis. 118, which we will consider with the Wisconsin cases. Yates, being the owner of a lot at the intersection of the Menominee and Milwaukee Rivers, built a wharf extending one hundred feet into the Milwaukee River, in order to reach the navigable part of the stream. The Wisconsin Legislature had previously authorized the Common Council of Milwaukee, by ordinance, to establish wharf and dock lines upon the banks of the Menominee and Milwaukee Rivers and to restrain and prevent encroachments. The city, by ordinance, declared this wharf to be an obstruction to navigation and ordered it abated. The suit was brought to restrain the city from destroying the wharf. Mr. Justice Miller, in deciding the case said:



"It does not seem necessary to decide whether the title to the lot extends to the thread of the channel of the river, though, if the soil was originally part of the public lands of the United States, as seems probable, the case of *Railroad Company v. Schurmeier*, 7 Wall. 272, would limit the title to the margin of the stream. But whether the title of the owner of such a lot extends beyond dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see fit to impose for the protection of the rights of the public, whatever those rights may be. This proposition has been decided by this court in the case of *Dutton v. Strong*, 1 Black 23, and *Railway Company v. Schurmeier*, just cited."

The court further said:

"We are of the opinion that the City of Milwaukee cannot by creating a merely artificial and imaginary dock line, hundreds of feet away from the navigable part of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel to build wharves and docks to it for that purpose."

The court further said:

"The law which governs the case is the common law on which this court has never acknowledged the right of the state courts to control our decisions, except perhaps, in a class of cases where the state courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the state. This is not such a case."

*Paine Lumber Co. v. United States, Supra.* This case grew out of a claim on the part of the Lumber Company that by the improvements made in the Fox and Wisconsin Rivers by the United States, including the purchase by the government of a certain dam for the maintenance of the same, the property of the complainant had been flooded and damaged. There was involved



a dock constructed by the complainant and the injury thereto. In charging the jury Judge Jenkins said on pages 866 and 867:

"You will consider if there has been any intrusion into this river by the plaintiff's premises beyond this high water line, as you will determine it; you will consider the object,—the nature and extent of that intrusion,—and whether it obstructs the navigation of that river, whether it goes so far and includes that part of the river which is navigable in fact: navigable for craft usually plying its waters. If this structure, this dock, has been extended beyond the line of navigable water so that it becomes an intrusion to navigation, an obstruction to commerce, taking into consideration the locality, the commerce that plies there, the width of the river,—if it has extended into waters navigable in fact,—then so far as it extended, the plaintiff cannot claim damages for injuries to that property by act of the government in improving the navigation of that river. But if it has not extended into navigable water,—waters navigable in fact,—if it is not an obstruction to navigation, then that property cannot be injured without compensation being made for the injury. This riparian right is property, as has been determined by the Supreme Court of the United States, and is valuable and, although it must be enjoyed in due subjection to the rights of the public, it is a right of which, when once vested, the owner can only be deprived in accordance with established law \* \* \* The right of the government to improve the navigation of a navigable river is paramount, and, as against the exercise of that right, the plaintiff had no right to obstruct navigation by encroaching upon the navigable part of the river \* \* \* But the plaintiff had the right to construct or maintain its dock in the river so far as to reach that point which was navigable in fact."

*Sage v. The Mayor, Supra.* This is a long case and involves the consideration of many matters, including grants, state statutes, etc., not pertinent here. It grew out of a contention between the owner of land abutting on the Harlem River, who, by many mesne conveyances



had succeeded to the rights of the grantees of Colonial Governor Nichols, and the rights of the city accruing under a subsequent grant of the streams and of all ungranted lands on the Island of Manhattan by Colonial Governor Dongan. The only value of the case here is the declaration of principles contained in it that even under the facts of the case that while the title of the owner of the upland, washed by the waters where the tide ebbs and flows, did not extend below high water mark, yet, as a riparian proprietor, he was invested with certain valuable privileges and easements, including the right of access to the navigable part of the river in front for the purpose of loading and unloading boats, drawing nets and the like, and that these riparian rights were property belonging to the riparian owner who could not be deprived of them without his consent or by due process of law, although he could only use them subject to the rights of the public.

*Harding v. Minneapolis etc., Ry. Co., Supra.* We may refer to this case again later on. Here it is sufficient to say that its purport is that, in case of the existence of no other facts furnishing a ground for a contrary view and in case of a complete survey of the lands by the government, abutting on navigable streams, and the omission to note or take account of a small island lying between the shore and the main and navigable channel of the river, that the rights of the riparian owner would extend out and over such island.

*Richardson v. United States, Supra.* This case is from the Circuit Court for the Eastern District of Virginia. The case is not of extreme importance. Speaking, however, of riparian rights, the court said, on page 717:

"It is true that the beds of navigable streams are the property of the state \* \* \* But the state holds these beds in trust for the public for the purposes of



commerce and navigation and subject to these purposes; and the Constitution has given Congress sole control over our navigation and commerce. So persons who hold under the state are affected with the same trusts. Therefore riparian ownership on navigable waters is subject to the obligation to suffer the consequences of the improvement of the navigation under an Act of Congress passed in the exercise of the dominant right of the government in that regard, and damages resulting from the prosecution of such improvement cannot be recovered in the Court of Claims." Citing *Gibson v. United States*, 166 U. S. 269; 21 L. Ed. 966;

*Dutton v. Strong, Supra.* Dutton owned a pier at Racine, Wisconsin, which extended into the lake and served the purpose both of a landing place for freight and storage. Strong's ship was driven by stress of weather to the neighborhood of this pier and the captain, fearful of going ashore, made his vessel fast to it. The violence of the gale increased the pull on the hawser by which the ship was moored to such a degree that the piles began to give way. The owner of the pier warned the captain to cut loose, which he did not do. The owner then cut the hawser himself and the vessel was driven upon another pier, and, to prevent utter destruction, was scuttled. The suit was to recover damages for cutting the hawser. The jury in the trial court, under the charge of the judge, found for the plaintiff. Justice Clifford in the course of his opinion, said:

"Bridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays and arms of the sea, as well as on the lakes; and where they conform to the regulations of the state, and do not extend below low water mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation. Whether a nuisance or not is a question of fact; and where they are confined to the shore, and no positive law



or regulation was violated in their erection, the presumption is that they were not an obstruction, and he who alleges the contrary must prove it. Wharves, quays, piers and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic states by riparian proprietors at a very early period in Colonial times, and in point of fact the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time. Our ancestors, when they immigrated here, undoubtedly brought the common law with them, as a part of their inheritance; but they soon found it indispensable in order to secure these conveniences, to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects. Different states adopted different regulations upon the subject; and in some the right of the riparian owner rests upon immemorial local usage. No reason is perceived why the same general principle should not be applicable to the lakes, although these waters are not affected by the ebb and flow of the tide; and, consequently, the terms 'high and low water mark' are not strictly applicable. But the lakes are not navigable in any proper sense, at least in certain places, for a considerable distance from the margin of the water. Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases."

*Railroad Company v. Schurmeier, Supra.* In the statement of this case it is said to be necessary, in a preliminary way, to refer to certain statutes of the United States governing the surveys and descriptions of public lands, and reference is made to the Acts of May 18, 1796, First Statutes at Large 446; May 10, 1800, Second Statutes at Large 73; February 11, 1805, Second Statutes at Large 333. These statutes enact that the public lands



shall be subdivided into townships, sections and quarter sections, and that these subdivisions shall be bounded by north and south and east and west lines, unless where this is rendered impractical by meeting a navigable water course, etc.

These acts of Congress require the contents of each subdivision to be returned to and a plat of the land survey to be made by the Surveyor General; and this makes necessary an accurate survey of the meanderings of the water course where the water course is the external boundary. And the line showing the place of the water course and its sinuousities, courses and distances is called the meander line.

This proceeding was begun in an inferior court of Minnesota by Mr. Schurmeier against the Railroad Company to enjoin the building of its railroad upon certain ground in the City of St. Paul, bordering upon the Mississippi. The Railroad Company defended and claimed to be the owner in fee of the *locus in quo*. The case was appealed to the Supreme Court of the United States from the Supreme Court of the State of Minnesota. It became necessary to discuss the rights of riparian proprietors to the property in question, and on page 275 is found a map showing this property to have been originally a small area containing 2.78 acres adjacent to the shore, at high water completely covered with water and at low water connected with the shore by a narrow neck of land. Before the suit was begun, this land had been filled in and made a part of the main body of the land. In the course of his decision, Justice Clifford said:

“Proprietors bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream; but the better opinion is that proprietors of lands bordering on



navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is that all such rivers shall be deemed to be and remain public highways. Grants of lands bounded on rivers above tide-water, says Chancellor Kent, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or right of passage, subject to the *jus publicum* as a public highway \* \* \* The views of the commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in the grant as a boundary, is used as an entirety to the center of it, and he, consequently, holds that the fee passes to that extent. Decided cases of the highest authority affirm that doctrine and it must doubtless be deemed correct in most or all jurisdictions where the rules of the common law prevail as understood in the parent country. Except in one or two states, those rules have been adopted in this country, as applied to rivers not navigable, when named in a grant or deed as a boundary of land. Substantially the same rules are adopted by Congress as applied to streams not navigable; but many acts of Congress have provided that all navigable rivers or streams in the territory of the United States offered for sale, should be deemed to be and remain public highways."

The court further said:

"Viewed in the light of these considerations, the court does not hesitate to decide that Congress in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to land bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be and should be deemed to be and remain public highways.

Although such riparian proprietors are limited to the stream, still they also have the right to construct suitable landings and wharves, for the con-



venience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide. *Dutton v. Strong*, 1 Black 23 (66 U. S. XVII, 29)."

*Packer v. Bird, Supra.* This case was decided in 1891 by Mr. Justice Field. It was an action for the possession of an island in the Sacramento River in the State of California, claimed by the plaintiff under grants of lands abutting on the west bank of the river, which plaintiff claimed notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, carried the title to the middle of the stream. It was assumed in the case that the river at this point was not affected by the tides. The court said it was undoubtedly the rule of the common law that the title of owners of lands bordering on rivers above ebb and flow of the tide, extends to the middle of the stream, but where the waters of the rivers are affected by the tides, the title of such owners is limited to ordinary high water marks; that the title in this country to the land below that mark is vested in the state within whose boundaries the waters lie; that private ownership of the soils under them being deemed inconsistent with the interests of the public at large to their use for the purposes of commerce, that these rivers are regarded as public navigable rivers in law which are navigable in fact and that they are navigable in fact when used or susceptible of being used in their ordinary condition for highways for commerce over which trade or travel are or may be conducted in the customary modes of trade and travel on water; that the same reasons exist in this country for the exclusion of the right of private ownership over the soil under navigable waters,—waters navigable in fact,—as when their navigability is determined by the tidal test. The court referred to the decision in the case of *The Genesee*



*Chief*, 53 U. S. 443 as being decisive of the abrogation of the common law tidal test of the navigability of rivers in this country and confirmed the doctrine of that case that the United States has wisely abstained from extending (if it could extend) its survey and grants beyond limits of high water.

The court further said (page 281):

"The courts of the United States will construe the grants of the General Government without reference to the rules of construction adopted by the states for their grants, but whatever incidents or rights attach to the ownership of property conveyed by the government, will be determined by the states subject to the condition that their rules do not impair the efficacy of the grants or the use or enjoyment of the property by the grantee."

*St. Louis v. Rutz, Supra.* In this case the attempt was to limit the grant so that no rights would be carried beyond low water mark, although the common law rule prevailed in Missouri, and a portion of the decision rests upon the application of that rule, which is not applicable here. It is to be noted that the court, in the decision, confirming some of the other cases hereinbefore reviewed, stated:

"The plaintiff was a riparian proprietor on a river. If his title to the land in question is not sustained, he is no longer such riparian proprietor and is cut off from access to the river. Among his rights as such riparian owner are access to the navigable part of the river from the front of his land and the right to make a landing, wharf or pier for his own use or for the use of public."

*Hardin v. Jordan, Supra.* The question in this

case was how far the rights of a shore owner on a small lake near Chicago extended. The case was decided by a divided court and on the construction of the local law of Illinois. A majority court gave the ripar-



ian owner the title to the center of the lake; the dissenting judges, several of the ablest on the bench, were willing to give that title only to the shore, leaving him his right to enjoy his riparian rights. Most of the opinion is concerned with the policy adopted by the Supreme Court of the United States to leave to the local courts of the states the construction as to what rights riparian owners should have as appurtenant to their grants from the government, the government not assuming to grant beyond the shore line.

*Kaukauna v. Green Bay, Supra.* This case grew out of a contention between various parties as to their respective rights on the Fox River, involving the improvement of that river as first undertaken by the State of Wisconsin and afterward by certain incorporated companies, and finally by the United States. The construction of a dam, a water power and a right to take water from the pond were involved in the controversy. The case is confirmatory of the policy adopted by the Federal Courts to permit the state courts to determine, subject to the public rights, and the case therefore dealt with the consideration of the course of judicial determination in Wisconsin up to that time, the last state decision referred to being that of *Janesville v. Carpenter* in the 77 Wisconsin, wherein the court said with reference to a riparian proprietor:

"He may construct docks, landing places, piers and wharves out to navigable water, if the river is navigable in fact, but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor or those having the superior right to use the waters for hydraulic purposes."

The case is not of great importance in the present controversy beyond the point above noted.



*Atlee v. Packet Co., Supra.* This is a case on appeal from the Circuit Court for the District of Iowa, decided by Mr. Justice Miller. Atlee had constructed a pier in the navigable part of the Mississippi River. A barge of the Packet Company had been sunk by colliding with this pier and Atlee had been held in damages. Atlee claimed the damages had been wrongfully assessed and that the libellants were in fault, and at least that the damages should be divided. The Supreme Court held that Atlee had no right to erect the pier where it was. Mr. Justice Miller in deciding the case said :

"The navigable streams of the country would be of little value for navigation if they had no places where the vessels which they floated could land, with convenience for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. Wharves and piers are as necessary, almost to the successful use of the stream in navigation, as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect, they must reach so far into deep water as to enable the vessel used in ordinary navigation to float while they touch them and are lashed to their sides."

While adhering to this doctrine and the right to wharf out to navigable water, etc., in aid of navigation, the court held that the structure erected by Atlee in the navigable channel of the river was unsupported by any of these considerations, was not in aid of navigation but was a menace thereto.

*Mitchell v. Smale, Supra.* This is another case arising upon Wolf Lake near Chicago, Illinois. It is ruled by the case of *Hardin v. Jordan* reported in the same volume. It would seem as though they referred to the lake in this case as non-navigable.



*Whittaker v. McBride, Supra.* This is an important case upon another point and will be referred to later on in this brief. For the purposes of the present consideration, all we need to say about it is that there was an island in the Platte River, which, while not appearing in the case, we may assume to be a non-navigable stream. The island was of 22 acres in extent, was practically overflowed by the river in the earlier days, at least, had not been surveyed by the United States which had surveyed and granted the lands on each side of the river. The owners of the opposite shore had been contending for some years with each other over the island, both occupying it, or portions of it. A third party entered upon the island and endeavored to have it surveyed by the government and was refused. The Supreme Court of Nebraska decided against this party having any rights and divided the island between the two opposite shore owners who were Kilgore and McBride, on the theory of extending the rights of each one to the *filum aquae*. The Supreme Court of the United States in this case upon appeal, without approving or passing upon the construction placed upon the decision of the Federal Court by the Supreme Court of Nebraska, sustained the decision of the lower court on the ground that it had decided the case in accordance with local law of the state in such cases.

Berry v. Snyder, 3 Bush. (Ky. 66) 266,  
 Blanchard's Lessees v. Porter, 11 Ohio 138,  
 Sherlock v. Bainbridge, 41 Ind. 35

show that although the northern boundary of the State of Kentucky by virtue of the terms of the cession of the Northwest Territory to the United States by the State of Virginia, is at low water mark on the north side of the river, nevertheless land owners on the



northerly side of the river are held to own the low water mark, and enjoy riparian rights on the river unimpeded by the state line.

The dissenting opinion of Judge Robertson in the Kentucky case, declining to apply the common law doctrine to the state of Kentucky, is very vigorous and is interesting reading.

In *Stockley v. Cissna*, 119 Fed. Rep. 834, which is a case relied upon by respondent, the court said:

"In *Goodwin v. Thompson*, 15 Lea, 209, 54 Am. Rep. 410, it was held that the title to the soil under the waters of streams navigable in a legal sense could not be acquired by individuals under the general land laws of the state, and a grant which expressly covered the bed of the French Broad River was held void. The opinion of the court was by Associate Justice Cooper—a very able and discriminating judge—and is founded upon a consideration of the policy of the state. In conclusion, the learned judge said:

"We think that the public use of our navigable rivers imperatively requires that the soil under the water should be in the state in trust for the public, that the title to the soil under such streams was not intended to be secured by individuals under our general land laws, and that any person setting up a claim thereto must be able to show an express legislative grant."

#### MINNESOTA AND WISCONSIN CASES.

We here cite the Minnesota and Wisconsin cases. We claim the following to be established by them:

(a) That navigability in fact has been substituted for ebb and flow of tide as a test of navigability in this country, including both of these states;

(b) That in Minnesota the owner of the shore lands abutting upon navigable water takes title only to



the shore with incidental riparian rights, whether the same be the waters of a lake or stream;

(c) That the title to the bed of any navigable waters is in the state in sovereign and not proprietary capacity as an unalienable trust, and no private ownership can be had thereunder save such right or use as is involved in riparian privileges incidental to the shore ownership which includes the right to wharf out in front of the shore proper, and for access to the navigable water;

(d) That although having begun with tide water as a test of navigability in deference to a case meagerly considered in an early day and which held the shore owners to own to the thread of the stream, the courts of Wisconsin have since adopted navigability in fact as the proper test and have refined away all substance of ownership in the bed of navigable streams until a shore owner in Wisconsin of lands abutting on such streams has no greater rights than a Minnesota shore owner, to-wit: only those incidental to ownership of the banks and not of the bed;

(e) That in Wisconsin the holding has been universal that as to lands abutting upon inland lakes or upon the Great Lakes and arms and bays thereof, the shore owner only takes to the shore;

(f) That in Wisconsin as in Minnesota the state holds the bed of navigable waters in trust in sovereign capacity unalienable, whether in lake or stream.

(g) That such riparian estate is a valuable estate, includes the right of occupancy and improvement subject to the public use if the rights of the public be authoritatively asserted at least as far out as the dock lines established by authority of law, and this includes the right of access in front of shore property to reach navigable water; that the shore owner in either state may while owning



the shore sever the right to use of the riparian estate from the parent estate by the transfer of one, reserving the other;

(h) In short, that, properly analyzed and construed, the authorities of these two states support the propositions hereinbefore laid down.

#### MINNESOTA CASES.

Schurmeier v. Railroad Company, 10 Minn. 82  
(Gil, 59)

Brisbine v. Railway Co., 23 Minn. 114,

St. P. etc., Ry. Co. v. First Div. etc. Ry. Co. 26  
Minn. 31,

Morrill v. St. Anthony Falls Water Power Co.,  
26 Minn. 22,

Union Depot etc., Co. v. Brunswick, 31 Minn.,  
297,

Lake Superior Land Co. v. Emerson 38 Minn.,  
406,

Miller v. Mendenhall, 43 Minn., 95,

Hanford v. St. P. & D. Ry. Co., 43 Minn. 104,

Waite v. May 48 Minn., 453,

Gilbert v. Eldridge, 47 Minn., 210,

Bradshaw v. Duluth Imperial Mill Co., 52 Minn.,  
59,

Everson v. City of Waseca, 44 Minn. 247,

Lamprey v. State, 52 Minn., 181,

Witte v. Board of Co. Comm'rs., 76 Minn. 288,

Shell v. Matteson, 81 Minn., 38.

See also Hobart v. Hall, 174 Fed. 433 and 186  
Fed. 426.



## WISCONSIN CASES.

The cases in the Supreme Court of the State of Wisconsin are as follows:

- Jones v. Pettibone, 2 Wis. 308; Reprint page 225;  
 Walker v. Shepardson, 4 Wis., 486; Reprint page 495;  
 City of Milwaukee v. Milwaukee etc. Ry. Co., 7 Wis. 85, Reprint 76;  
 Mariner v. Schulte, 13 Wis. 692; Reprint page 775;  
 Arnold v. Elmore, 16 Wis. 509; Reprint page 536;  
 Yates v. Judd, 18 Wis. 118; Reprint page 126;  
 Wisc. Imp. Co. v. Lyons 30 Wis., 61;  
 Olson v. Merrill, 42 Wis. 203;  
 Doorman v. Sunnuchs, 42 Wis., 233;  
 Diedrich v. N. W. U. Ry. Co., 42 Wis., 248;  
 Cohn v. Wausau Boom Co., 47 Wis., 314;  
 Norcross v. Griffith, 65 Wis. 559;  
 Chandos v. Mack, 77 Wis., 573;  
 McLennan v. Prentice, 85 Wis. 427;  
 Reysen v. Roate, 92 Wis. 543;  
 Priewe v. Wis. Land & Imp. Co., 93 Wis. 534;  
 Ne-Pee-Nauk Club v. Wilson, 96 Wis. 290; 71 N. W. Rep. 661;  
 Willow River Club v. Wade, 100 Wis. 86; 76 N. W. Rep. 273;  
 Mendota Club v. Anderson, 101 Wis. 479; 78 N. W. Rep. 185;  
 Village of Pewaukee v. Savoy, 103 Wis. 271; 79 N. W. Rep. 436;  
 Priewe v. Wis. Land & Imp. Co. 103 Wis. 537; 79 N. W. Rep. 780;  
 Illinois Steel Co. v. Bilot, 109 Wis. 418; 85 N. W. Rep. 482;  
 Atty. Gen. ex rel Askew v. Smith, 109 Wis. 532; 85 N. W. Rep. 512;



- Rossmiller v. State, 114 Wis. 169; 89 N. W. Rep. 839;  
 Abbott v. Cremer, 118 Wis. 377; 95 N. W. Rep. 387;  
 McCarthy v. Murphy, 119 Wis., 159; 96 N. W. Rep. 931;  
 Franzini v. Layland, 120 Wis. 72; 97 N. W. Rep. 499;  
 Walls v. Cunningham, 123 Wis., 346; 101 N. W. Rep. 696;  
 Sliter v. Carpenter, 123 Wis. 578; 102 N. W. Rep. 27;  
 Minehan v. Murphy, 134 N. W. 1130.  
 Kelly v. Salvas, 131 N. W. 436;  
 Farris v. Bentley, 124 N. W. 1002.

We do not feel justified upon this petition in reviewing these decisions. We claim for them—that the Minnesota court has consistently held that as to navigable streams and lakes the owner of lands abutting thereon holds at furthest to low water mark, that is that he holds that ownership, unless otherwise severed by him he holds to the edge of the water in fee and that appurtenant to that ownership, unless otherwise severed by him he holds valuable riparian rights, often the most valuable part of his estate, among which and the principal of which is the right to wharf out into and over and upon the shallow waters to reach the point of navigability and to have access from his premises to the navigable and navigated channel of the waters; that the title to the bed, whether the same be lake or stream, rests in the state in its sovereign capacity, in trust for public uses; that this title is a sovereign title and is not transferable by the state to private ownership; that the common law doctrine in its modified form is in force in this state. As to non-navigable lakes and streams, the court holds that the shore owner takes to the center of the lake or the thread of the stream. There can be no question under the Minnesota



decisions as to the rights of a riparian owner upon a navigable stream.

Many decisions have been given by the state court involving various phases of riparian rights, their character, severability, etc., several of which are upon the St. Louis Bay and the Duluth-Superior Bay. Although the current from the St. Louis River may be traced through a portion of these waters and at times a current runs into Lake Superior proper, there has never been a suggestion by anybody, court or counsel, that the waters of these bays should be treated as the waters of a river. The same body of water and of the same character extends at least above Spirit Lake, to the south end of Big Island.

We shall mention this again but simply here state that whether we construe these waters at the *locus in quo* to be the waters of a river, or the waters of an arm of the lake, the rule is the same in Minnesota, and in all of these decisions the rights of the riparian owner, while considered valuable, vested property rights, are always subject to the paramount right of the government and its control over the waters and the commerce thereon, the rights of the riparian owner to carry his improvements out into the waters being limited by the dock line established by governmental authority, and we have no hesitancy in saying that the right of access to the navigable and navigated portion of the waters, so far as the Minnesota decisions are concerned, is not to be denied to the shore owner nor abridged by the existence of the interstate boundary therein or thereunder. The municipal subdivisions of the state have assumed jurisdiction of the property and property rights out to the new dock line as established by the government and have taxed the property and property rights out to that line. Titles in some cases have been Torrensized to that line under the Torrens land title act of the state, and in this respect the



acts of the public officers and the decisions of the courts of the state are all consistent with our contentions in this case. See also *Hobart vs. Hall*, 174 Fed. 433 and 186 Fed. 426.

That as to Wisconsin no greater rights exist in the shore owner either upon lakes or streams, than under the Minnesota decisions. That while the Wisconsin court has suffered from not tossing *Jones vs. Pettibone* aside a generation ago, and has struggled at times with a doctrine of state concession by court decision although holding that the state could not even by legislative enactment abrogate any part of its trust or alienate any title to the beds—the sum of the final doctrine of the court in that state is fully expressed in the conclusions we have laid down. That whether these waters be those of a stream or an arm of the lake, this petitioner cannot be deprived of his rightful access to navigable water and the location of an interstate boundary in the waters gives the respondent no license to cut off such access. That no matter where the dividing line is under the water the citizens of neither state can be deprived of that access. That these rights depend upon the ownership of the shore and not of the bed. With all due respect we must conclude that the learned circuit court of appeals did not sufficiently examine these Wisconsin cases or our extended review of them and quotations from them in our brief to become thoroughly familiar with them.

## VII.

THE TRUE CHARACTER OF THESE WATERS AT THE LOCUS IN QUO, UP TO AND INCLUSIVE OF SPIRIT LAKE, IS THAT THEY ARE PART AND PARCEL OF LAKE SUPERIOR AND CONSTITUTE BUT AN ARM OR BEGINNING OF THE GREAT LAKE. IN SUCH CASE THE TITLE OF THE ABUTTING LAND OWNER, WITHOUT



ANY CONFLICT OF AUTHORITY, STOPS AT THE SHORE WITH APPURTENANT RIPARIAN RIGHTS, INCLUDING THE RIGHT TO WHARF OUT AND TO REACH THE NAVIGABLE WATERS IN FRONT OF HIS SHORE PREMISES.

Notwithstanding the persistency with which counsel, from the framing of the answer to the writing of their brief, contend this to be St. Louis River, we believe the above proposition to be firmly established in this case. It rests upon the facts shown in the record. It is supported by the authorities hereinafter cited, and it follows as a natural sequence from the cases hereinbefore submitted. If this proposition is sustained by the court, there is nothing left of the defense for the reason:

(1) The defendant admittedly cannot then claim the ownership of the bed;

(2) Then, no matter where the interstate line lies in the bottom of these waters, the defendant could not stick himself in this arm of the sea in front of plaintiff and say, "You shall pay tribute to me before you reach navigable water."

(3) There would be no occasion to apply the doctrine of *the thalweg*, only exceptionably applied to bodies of water.

(4) There could be no serious claim made to ownership of the island. It did not grow upon a bed owned by appellant, neither was it left an unsurveyed, negligible quantity near his shore, for it was not then in existence, nor did it accrue to him by accretion.

For these reasons counsel have ever spent much of their argument upon the claim that the lands of these contestants abutt upon a river. While we wish to consider the matter of the little island in question to some extent separately, it must of necessity come in for some notice in a discussion of the above proposition,



for in some of the cases sustaining this point islands were involved and held to be in the waters of the lake, and to pass with the bed to the state in sovereign ownership.

The defendants, both Whiteside and Tallas, have in their answers strenuously alleged these waters to be the waters of the St. Louis River and they allege that the St. Louis River, after a very strangely divided course, flows into Lake Superior between Minnesota and Wisconsin Points; that is to say, they undertake to claim that the natural entry, connecting the Bay of Duluth with Lake Superior proper, between these points, is the St. Louis River emptying into the lake. The complaint alleged (paragraph 9) that the St. Louis River is a stream that has its source in the lakes and forests some seventy-five miles northward from the City of Duluth and is for the most part a rapid stream, flowing with great velocity, through well defined, and for a long distance natural rock walled banks, down steep declivities and over a rocky bed until its waters form the first falls above the Indian Village mentioned in the Constitutions of these states, below which its waters become mingled with those of Lake Superior at some point above Spirit Lake; that it is and always has been navigable below the said first falls above the Indian Village and navigated by multitudinous craft engaged in the navigation of the Great Lakes and the arms thereof. The complaint further alleges the various acts of Congress and the improvements made in aid of navigation of these waters, all of which are practically admitted in the answers of all of the defendants. The complaint alleged that the lands of the plaintiff and the defendants Whiteside and Alexander border upon the Bay of St. Louis. The answers of both defendants deny this and allege that they border upon St. Louis River and they deny that the Bay of St.



Louis is a part of Lake Superior; they allege all of these waters to be enlargements of the river and that the river contracts between Rice's Point and Connor's Point and enlarges again into Superior Bay, and finally empties into the lake between Minnesota and Wisconsin Points. There is some quibbling in the answers with respect to the navigable character of these waters, but, nevertheless, not only in the bill of complaint but in the answers of the defendants, there is sufficient to establish the navigable character of these waters, even if the proof was slight, but the record contains abundant proof that from the earliest times these waters were navigated by multitudinous craft plying the Great Lakes. The answer of the defendant Whiteside contains some additional allegations not found in the other answer with respect to the basin into which the waters of the St. Louis River flow. (See paragraphs 20, 21 and 22.) In these paragraphs there is an attempt to allege the spreading out of the St. Louis River over the great basin that forms the upper part of the head of Lake Superior. Without here quoting at length from these paragraphs, we are content with saying that, contrary to the intent of the defendant therein answering, the topography of the country and the conditions are alleged in a manner which negatives the character of these waters as being those of a stream.

In connection with plaintiff's allegations and the other proofs, let the maps be examined. We assert that there is no point which can be fixed as the mouth of the St. Louis River until the south end of Big Island is reached. The maps prefixed to this brief, prepared by Mr. Patton by uniting certain of the exhibits, make clear our contention. If these waters, at the point here in question between these parties and up to a point above mentioned, constitute a river, then the waters of St. Louis



Bay and the Duluth-Superior Bay are just as much those of a river. If it is suggested that the terms used in the constitutional boundary which make mention of the St. Louis River, should be applied to this point in question, then we have only again to say that there is no point below Spirit Lake which can be fixed as the mouth of the river and the constitutional boundary did not go into detail of description. It said "through the St. Louis River and Lake Superior." It only mentions the river and the lake. To call these bays and Spirit Lake a part of Lake Superior does not contradict the constitutional boundary. The mere fact that a current is discernible at times through these waters, or some portion of them, and in certain places in these bays and even in a portion of Lake Superior east of Minnesota Point, does not make them a river.

There is no trouble whatever with the constitutional boundary. It did not locate the mouth of the St. Louis River. It is apparent that there is no reason within the authorities or common sense in claiming the waters below the junction with Spirit Lake or St. Louis Bay to constitute a river. There is far more reason and common sense in claiming that the natural entry between Minnesota and Wisconsin Points is the Nemadji River than there is for claiming that it is any part or parcel of the St. Louis River, but as a matter of fact, it is not a river at all. (See Ex. 3, 5, 9, 11 and 12, shown also upon the compiled maps prefixed to this brief.) The record shows abundant proof to sustain the contention of the plaintiff that the waters in question are in their true character part and parcel of the Great Lakes. It matters not under the authorities which we submit by what name they may have been called by any explorer, engineer or even legislature. What is their true character is the question and this counsel admit.

Exhibits 3, 4 and 5, the original government land



maps, show these waters and designate them as St. Louis Bay. They have been navigated from the earliest times by the craft plying upon the Great Lakes as well as by local craft. The old trading post was at Fond du Lac (head of the lake.) (See evidence of Alfred Merritt, pages 44 et seq. and folio 103, p. 59.)

Mr. Merritt described the various bays and the widening of the shores below Fond du Lac until the greatest width of Lake Superior is reached. (Folio 87, p. 51 of Transcript). He said that the waters from Spirit Lake down did not resemble a river in appearance, but were bays. (Folio 83, page 50.) That Minnesota Point is sand and gravel and Wisconsin Point sand, and that Minnesota Point is so narrow in places that the water has blown through; that the water seeps through these points and that it is but a few feet down to the water. That he has seen the blue lake water away up into St. Louis Bay when the waters were still,—waters that came in through the Superior Entry. (Folio 84, pp. 50-51 of Transcript.)

On cross-examination at Folio 91, when asked if St. Louis Bay and Pokegama Bay were not formed by the St. Louis River, Mr. Merritt said that he did not know how they were formed, but that the St. Louis emptied into the upper part. Asked if they were not formed by the overflow of the river, he answered, "Well, the lake backs up."

Mr. Merritt insisted that there are tides recurring at different intervals during the day in Lake Superior, a rise and fall of about nine inches, and that this variance with the lake was shown in St. Louis Bay and is independent of the great rises caused by winds. (See Folio 93.)

Mr. Merritt described the island which counsel called in their brief for the first time "Tallas Island," as a little spit of land on the northerly part and the remainder



marsh with some cedar and black ash on it, such as would grow in wet lands, and that the island was many times covered with water. (See Folio 80, page 48.) He testified that the waters of the bay at the locus in quo are and always have been on a level with Lake Superior, subject to the rise and fall of the lake; that the currents run both ways; (See Folio 82, page 49); that he had known the waters of the lake to rise four feet, showing a rise on the shore of St. Louis Bay to that extent. (Folio 94.)

Albert Swenson has lived nearly all his life on the shores of Spirit Lake; testified to the waters flowing both ways, to the periodical movement of the waters independent of the action of streams, and that he had been floated up by the current clear across Spirit Lake with a loaded craft, and confirmed in every respect Mr. Merritt's testimony as to the character of the waters. He testified as to the island in question, that the growth on it was alders and willows and most of the island was marshy (p. 65); he also insisted that there were tides from the lake running up these bays.

John H. Darling, Government Engineer, while stating that he did not believe in Lake Superior tides properly speaking as such showed that these waters at the locus in quo were on a level with the lake; that there is scarcely a perceptible slope; that there is a very slight current which is practically lost in the bays; that the waters set back and flow both ways; that experiments by simultaneous gaugings extending over a considerable period of time showed that the water in its normal condition at Minnesota Point, at New Duluth and at Fond du Lac below the rapids is on a level, and that a rise of less than three inches in the lake will be felt approximately up to Fond du Lac; testified as to this small horseshoe-shaped island between the lands of plaintiff and defendant; that in the making of the government improvement which he



said was made in betterment of navigation and commerce, this island was cut through and that that portion on the southerly side had since disappeared; that the improvement was the deepening and straightening of the channel by dredging; that the dredging and the deposit of the dredged material had largely filled up the old deep water channel. (See pp. 68 to 71 of Transcript.) That there were currents in these waters both eastward and westward, and that the waters east of Minnesota Point and above this point in question were on a level with the lake; that there is almost a continuous fluctuation of the level of the lake, a rise and fall, and that whenever the lake rises the water sets in through the canal and through the Superior Entry until the water in the lake falls below the normal level; then it settles down and holds out long enough to draw the water of the bays down to its level; that there is a movement independent of wind or storm. (See pp. 70 to 73.)

Charles A. Pearson, a man exceedingly familiar with these waters, spent much time upon them, a student of geology and geography, testified that there is a fall in the St. Louis River of 700 to 750 feet between Cloquet and Fond du Lac; that there is no perceptible drop between Fond du Lac and the lake east of Minnesota Point; that the waters spread out over the whole valley and look to be an arm of Lake Superior; testified as to the shores, the existence of numerous bays, many of which he had explored, the various streams running in; that the waters of St. Louis Bay at the locus in quo open out into Spirit Lake at substantially the full width; testified to the mingling of the waters, to the flowing of the waters both ways; testified that there were what might be called tides at fairly regular intervals, but under normal conditions there was no perceptible current in these waters. (Pp. 90 to 96 of Transcript.) These waters then are on a level



with the lake, rise and fall with it. Any perceptible rise or fall in the lake east of Minnesota Point is felt in these bays and the waters flow backwards and forwards with absolutely nothing to separate them from the main body of Lake Superior except these points of land, by reason of the existence of which local names have been applied to these bays. The existence of these waters does not depend upon the river more than the fact that the river may add slightly to the volume of the water contained in the lake basin. There would be water in these bays whether there was any river there or not; the action of these waters is not that of a stream, nor do they resemble that of a stream.

Upon these facts shown on the record, upon good sense and sound reason, and upon every principle of law and public policy, as disclosed by the cases already cited and by those which we now ask the court to consider, these waters should be held to be a part of the Great Lakes and governed in all respects by the law applicable thereto.

Ainsworth v. Munoskong Hunting & Fishing Club, 123 N. W. 802

Sherwood v. Comm'r State Land Office, 113 Mich. 227

People v. Silberwood, 110 Mich. 106 s. c. 32 L. R. A. 694

State v. Fishing & Shooting Club, 127 Mich. 580

State v. Venice of America Land Co. 125 N. W. R. 770

People v. Featherly, 12 N. Y. S. 389

Bode v. Shooting Club, 57 O. St. 226

Hogg v. Beerman, 41 O. St. 81

Fletcher v. Phelps, 28 Vt. 257

Lawton v. Steele, 119 N. Y. 226

Ne-pee-nauk Club v. Wilson, 96 Wis. 290; 71 N. W. 661.



*Ainsworth v. Munoskong Hunting & Fishing Club.*  
*Supra.* Decided December 10, 1909. Published January 7, 1910.

We have examined the record and briefs in this case, including the evidence given upon which the decision was based, and the evidence is not stronger than that in the case at bar, as tending to establish the character of the waters in question as a part of the waters of the Great Lakes. We have also examined the government charts of these waters. The Munoskong case was so framed up as to leave the sole question to be determined whether Munoskong Bay was a part of the waters of St. Mary's River or part of the waters of Lake Huron.

Munoskong Bay opens into Mud Lake. The waters of two of the channels of the St. Mary's River find their way into Mud Lake and Mud Lake continues down to the broader expanse of water known as Potagannissing Bay. Mud Lake is from one and a half to two and a half miles in width, speaking roundly. All of these waters reach Lake Huron through the Detour Passage. It was held in this case that the names applied to waters by geographers, navigators or even legislatures cannot change the character of the waters. What they are must be determined by their character; that Munoskong Bay is not a part of the St. Mary's River, but a part of Lake Huron and that the title of a riparian owner therefore only went to the shore.

In reaching this determination, much force was given to the fact that the waters were on a level with the lake, rise and fall therewith; that the appearance of a river was gone, the swift flow of the water absent and that the fact of a current through the waters was not controlling. The fact that it was not a widening of the stream which again assumed the definite form of a river was given



much force. It was held that the river had lost its character as such at the foot of the Neebish Rapids.

All of the facts considered by the court controlling in this case as determining whether these waters should properly be called the waters of the river or of the lake, have been established in the case now before the court.

An examination of the map will show the full force of the decision as applied to the facts of this case,

The river, having struck the level of the lake, spreads out into an expanse of water in which are numerous small islands, and this expanse of water is connected with the lake by a narrow passage similar to the inlet between Minnesota and Wisconsin Points. The contention of the defeated party in the Munoskong case was that Mud Lake was St. Mary's River; that Munoskong Bay was an enlargement of the river. The resemblance is striking to the contention of the defendants in this case with reference to St. Louis Bay and Spirit Lake.

*State v. Venice of America Land Co.*, 125 N. W. 770. Decided April 1, 1910. In this case it was held:

That the land involved was part of the bed of Lake St. Clair and that the title passed to the state upon its admission into the Union and that it is held in trust for the people for the purpose of hunting, fishing, etc.

That the title to submerged land held by the state cannot be divested by adverse possessions.

The land in question was the lower part of what is known as Harsen's Island. The upper part of the island had been surveyed and patented. The lower part was boggy, sometimes covered with water; sometimes portions of it out, and in which there was a growth of subaqueous vegetation, and on part of it there was prairie grass. It



was unsurveyed and the court held it to pass to the state as a part of the bed of the lake.

*Sherwood v. Comm'r State Land Office, Supra.* This case held that an unsurveyed island known as Sweet's Island, situated 600 feet from the shore and between Detour Passage and St. Joseph's Island, belonged to the state and not to the adjacent land owner; that it belonged to the state as a part of the bed of the waters and held that it was in the waters of Lake Huron. The court generalized the holding in the syllabi so that the same reads "that the fee of an unsurveyed island in one of the Great Lakes, situated several hundred feet distant from the main land, is in the state and not in the riparian owner," and that "an island lying contiguous to the main land of the Upper Peninsula between Detour Passage and St. Joseph's Island, is within the waters of Lake Huron and not in the St. Mary's River."

Detour Passage bears a close resemblance to the Superior Entry between Minnesota and Wisconsin Points.

This case was approved in the Ainsworth case and referred to as holding that the waters in question were a part of Lake Huron and not a part of the St. Mary's River, and that the reasons that must have governed the decision in that case, applied with equal force to Mud Lake and Munoskong Bay.

*People v. Silberwood, Supra.* Holds that the title of the shore owner at the *locus in quo* stops at the shore and upholds the act of the state legislature in setting apart a tract of the lake for public fishing, shooting, etc., so as to preserve the marshes.

*State v. Fishing & Shooting Club, Supra.* In this case the minority opinion of Judge Hooker is the principal opinion and is printed first. The court made by its syllabi his opinion the opinion of the court with respect



to the matter of the title to the beds of lakes, etc., but the majority of the court differ from him on a conclusion of fact upon the evidence. The minority opinion of Judge Hooker is cited as the opinion of the court with respect to the matters which make up the greater part of it. He held the Flats to be a part of the bed of the lake. It was held that the title cannot be gained by adverse possession of lands held by the state.

It is a strong case on the character of the state's title to the beds of lakes, to the effect that the same is sovereign, not proprietary or alienable, and on the question that the title of the owner of lands abutting upon the shore stops at the shore.

Michigan, it should be remembered, is one of the states that, unlike Minnesota, holds that as to navigable streams the title of the abutting owner extends to the thread.

*People v. Featherly, Supra.* Sodus Bay, a body of fresh water in Wayne County, about five miles long and three miles wide, which has an opening into Lake Ontario, from which it is separated by a bar about a mile in length, was held to be a part of the lake. Some of the waters in the bay, it was shown by some of the witnesses, came from Lake Ontario. The opening into it was wide enough for boats to run in. The sand bar between the lake and the bay, one witness thought, was formed by the action of the waters in the lake; that when the wind was in a certain direction the waters in the lake would sometimes wash over the bar and there would be a current setting back in the bay. The channel was sixteen feet deep in which the waters flowed in and out at intervals, and the flow did not altogether depend upon the direction of the wind.

*Hogg v. Beerman, Supra.* The controversy in this



case was over land titles and the question was whether the northern edge of an island and dyke was the shore of Lake Erie, as referred to in a certain grant, so as to include within the grant a certain small harbor. Interpreting the language and terms of the grant, the court held that it was. The grounds upon which the decision rested are not necessary for us to specially consider, but the court said, in the course of the decision (referring to Lake Erie) "in one sense, all its bays and harbors are part of the lake."

*Bode v. Shooting Club, Supra.* In this case the question was whether certain waters were a continuation of Sandusky Bay or were waters of the Sandusky River and Mud Creek. The trial court found that they were the latter. Appeal was taken to the Supreme Court. The attorney for the plaintiff in error, in discussing various definitions of a river, claimed that the Sandusky River has no banks after passing through the marsh and emptying into Mud Creek near Squaw Island, and that between Squaw Island and Sandusky Bay, where the channel continues through Mud Creek Bay, there are no banks above water; that the waters of Mud Creek rise and fall with the waters of Sandusky Bay, which rise and fall with the waters of Lake Erie. He contended that the state held the title to the bed. The attorneys for the defendant in error claimed that Mud Creek Bay and the broad expanse of Sandusky River answer all the requirements in the definition of a river; that they are streams of water flowing in a particular direction and in regular channels, between banks; that the fact that they spread out over great expanse of low land and overran their channel banks was of no significance. He likewise claimed that it was of no significance that the waters rose and fell with the waters of Sandusky Bay. The court held that the waters in dispute formed part of the bay and not part of Sandusky River and Mud Creek.



*Fletcher v. Phelps, Supra.* The dispute in this case was over the boundary to a tract of land abutting on a pond and a creek, and the question arose as to whether a different rule applied in determining the extent of the land where it abutted on the pond and on the creek. There is a small rivulet or stream which passes through the center of this low land and the lake, when it is not overflowed, the bed of which is distinguishable by being somewhat lower than the rest of the low land. At low water in the lake the stream is limited to this channel and is to some extent supplied with water from inland springs. The court gave the same effect to the grant of land involved where it abutted on the so-called creek as it did to that which was admitted to be upon a pond and said that at times of high water in the lake this creek appears to be little more than an arm or inlet of the lake itself, and the rise and fall of the water in the creek depends upon the rise and fall of the water in the lake.

These waters, then, being part of Lake Superior, the Wisconsin doctrine as applied to lakes and ponds, including the Great Lakes, should apply here and in no event in such a case could the shore owner or owner of land abutting thereon in that state have any kind of a title beyond the shore, but he would have the usual riparian rights, subject to the rights of the public, precisely the same as he would have in Minnesota; precisely the same as he would have in Michigan.

In *McLennan v. Prentice*, 85 Wis. 427, involving a tract of land on Chequamegon Bay, the court held that the lands lying in the shallow waters of the Great Lake and between the bank and the navigable water, are held by the state in trust for public purposes of navigation and fishing, and no grant thereof for any private purpose can operate to impair or defeat the previously accrued rights of the riparian owner. That the title of the state is a sovereign title and that it cannot abdicate its trust.



In *Ne-pee-Nauk Club v. Wilson*, 96 Wis. 290, the question in controversy was the title to lands under Mud Lake, whether the state owned them or whether the plaintiff owned them by virtue of riparian ownership, and the question depended, the court said, on whether Mud Lake is a meandered lake or a water course. It was from 35 to 65 rods wide and three miles long. In the spring and fall the whole surface was covered with water. In summer, much of the water disappeared. It was navigable by small craft, such as canoes and hunting skiffs. It was formed by the expansion and dispersion of the waters of a small stream called Grand River. After Grand River comes into and becomes Mud Lake it follows no definite channel. The court said:

"It is said that the controlling distinction between a stream and a lake or pond, is that in the one case the water has a natural motion, a current, while in the other, the water, in its natural state, is substantially at rest; this entirely irrespective of the size of the one or of the other. But not every sheet of water in which there is a current from its head towards its outlet is therefore a stream." (Citing Angell on Water Courses, 6 Ed. Sec. 4 f.) "It is said that even the large lakes have such a current."

The court held the body of water to be a lake and the title to the bed thereof to be in the State of Wisconsin and the title of the shore owner to stop at the shore.

We have already shown that in the State of Minnesota there is no distinction made between navigable lakes and streams. None ought to be made. In practical effect none is made in Wisconsin, although that state has present to harrass the court the old cancer of the fiction of some sort of a title in the bed, growing out of the old common law doctrine of tide waters, adopted in the 2nd Wisconsin, and long since held inapplicable both by the state court and by the Supreme Court of the United



States. When navigability in fact has been substituted for the ebb and flow of the tide as a test of navigability, there is no longer any proper ground for a distinction between navigable lakes and navigable streams. This we have before fully discussed, but if these waters are held by the court under these authorities and upon this record to be a part of Lake Superior, then there is no question whatever as to the doctrine of the State of Wisconsin. See also *Prieve v. Improvement Co.*, 93 Wis. 534, 103 Wis. 548, and *Diedrich v. N. W. U. Ry. Co.*, 42 Wis. 248, *supra*.

Counsel have endeavored to refine away the force and effect of these cases and to draw distinguishing comparisons, but we contend that natural facts and conditions cannot be changed by arguments and that the controlling facts in all of these cases appear here in this record in even greater degree. Counsel say on page 25 of their brief that Mr. Darling testified to a well defined channel and give definitions of a river to show that a channel is a characteristic of a river. Mr. Darling said that there had been a channel caused by the scouring action of the water current, especially in times of flood; that it is usually limited to flood periods; that the old maps show a channel which dies out and disappears in the broad expanse of St. Louis Bay, and that there is a stretch where there is no channel at all. He also testified to there being such a channel in Superior Bay; that there was a current both ways through the natural entry and through the canal. (Folios 154-156 of Transcript.)

We submit that this evidence does not tend to establish a river channel nor to establish that either these bays or arms of Lake Superior or the Great Lake itself constitute a river, neither does the effort of counsel in cross-examination to show the existence of a current and slope to the waters from Fond du Lac to the Atlantic Ocean



tend to establish that fact. Neither currents nor such channels as the witness was defining tend to prove St. Louis Bay to be a river.

In several of the cases cited by us a current was discernible clear through the lake and in the Wisconsin case of Ne-pee-Nauk Club 96-290 the lake was but a small, shallow body of water created by the expansion and dispersion of the water of the stream. Finally, and apparently principally, counsel fall back upon the claim that by Congressional declaration this body of water is the St. Louis River. This declaration, they contend, is embraced in the constitutional boundary by the reference to Nicolett's map. They also claim that the language used as applied to the lake is "middle of Lake Superior," but as applied to the river it is "up the main channel of said river," and they argue that therefore the boundary line is in the actual middle of the lake, but as applied to the river it must follow the thread of deepest water as the intendment of the act. This is refinement with variations. In the first place Congress did not define in detail these waters nor was that its purpose. It referred to Nicolett's map, it is true, and Nicolett's map showed the river and showed the main lake and did not show these bays. Nicolett's map was not primarily a map of these waters nor did it give them in detail. It was a map of the upper Mississippi Basin. The exhibit is a section of it. The line ran through the lake and through the river to the first rapids above the Indian Village, and thence south to the St. Croix River, etc., and the act said it was according to Nicolett's map. The map, in view of the large country embraced in it, was on a small scale. It was probably the only map of the region available. It is straining it a good deal to say that by that reference the character of these waters is fixed as the St. Louis River. If counsel stick to the middle of the lake, and stick to



their ten-mile-wide west end of the lake, they can never reach the St. Louis River, but if they follow on as near as may be through the middle of Lake Superior, including these bays, they can reach the river. They draw a distinction in the description of this boundary line in the lake and river and yet must immediately depart from it in order to get anywhere. So far as Nicolett's map appeared, one might go perhaps right from the middle of Lake Superior into the St. Louis River, but it cannot be done and counsel must vary from that map in order to get out of what they are willing to call Lake Superior; yet they insist that because of the reference to that map there must be a broad ended lake and this river flowing into the middle of it whether it is so or not. Still applying the term in an elastic way, they wish to modify it so as to reach the deepest water, yet when the government in the exercise of the power known by the states and by all to have been reserved in it to improve the ship way, has improved it in the actual middle of these waters, they no longer want to go in the middle, but claim to own the whole channel and consequently to have the right to exclude the opposite shore owner from access thereto,

In the case of *Louisiana v. Mississippi*, much relied on by counsel, the constitutional boundary ran down the Mississippi River to the River Iberville and thence along the middle of said river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico, but to get to the gulf this boundary had to be interpreted to run through the Rigolets and through Lake Borgne, else it could not have been carried to the gulf at all. Constitutional boundary descriptions such as this are general, and often have to be determined, construed and applied, the intendment sought and a solution arrived at that will do justice to both commonwealths and the citizens thereof, in obedience to the controlling principle as laid down in the cases from which



we have fully quoted, viz., that neither of the states nor the citizens thereof shall be deprived of their access to the actually navigable and navigated water. We submit, therefore, that the lands of these parties border upon the bay, an arm of the Great Lake, and that their ownership never extended further than the shore with incidental riparian rights; that the title to the bed is in the states in sovereign capacity, as an inalienable trust, and that whatever rights the shore owners have depended upon the ownership of the shore or bank and not of the bed; that no private ownership can grow upon the bed; that the middle line which counsel are anxious to apply to the lake applies here, and there is no occasion for its location anywhere else.

In this connection we may as well consider what effect, if any, the case of *Louisiana v. Mississippi* has upon the issues of this case, for counsel claim that by reason of that case they do not need to rely upon the claim that this is a river and not an arm of the sea. They say that the doctrine of the thalweg is made by this case to apply to such arms and bays the same as to rivers. We do not believe counsel for appellant would be willing to stand on that proposition alone in this case. The effect which they seek to obtain from it is that the interstate boundary would run north of the little island and not through the actual middle of the bay, and that there it must remain and that their riparian rights extend to that line. We do not think such effect is to be given it, or that it tends to support plaintiff's claim of ownership of the island or to support the claim that anybody else could ever obtain title to the island. *The island was not there when the constitutional boundary was established by law, nor does it appear where then was the deepest water.* The island arose afterwards upon a bed belonging to the state. The controversy in the Louisiana-Mississippi case was insti-

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gated by reason of conflicting claims to islands in the Mississippi Sound arising by apparent conflict in the constitutional boundaries of the two states and instigated by the control which each state sought to exercise over the oyster industry. To fix that boundary the boundary had to be run from the Mississippi River to the gulf. The court examined much evidence and many maps, considered many facts and sought for the intendment of Congress and applying the purpose of running a line through these waters to the gulf, and in order to give effect to the boundary line, the court made it follow the ship way through the Rigolets and through Lake Borgne and through Mississippi Sound, none of which had been mentioned in the boundary at all, and established the same as running through the inlet or pass between Cat Island and Isle a' Pitre to the Gulf of Mexico. This was the most practical way and to the court, as it appeared, a just way to settle that boundary.

AS to the doctrine of the thalweg, the court, after quoting Mr. Justice Field's decision in the case of *Iowa v. Illinois*, said:

"This judgment related to navigable rivers. We are of opinion that *on occasion* the principle of the thalweg is applicable in respect of water boundaries to sounds, bays, straits, gulfs, estuaries and other arms of the sea. As to boundary lakes and land locked seas where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states, but whenever there is a deep water sailing channel therein it is thought by the publicists that the rule of the thalweg applies." (Italics our own.)

It is clear enough that in general appliaction the thalweg doctrine applies only to rivers, but on occasion such as existed in that case, in order to give effect to the purpose of making waters an interstate boundary, the



court has applied the doctrine. The cases are rare, the Louisiana case being practically the only one, we think. But here in the case at bar the court, without evidence as to conditions at the date of the Congressional enactment, is asked to apply that doctrine for the purpose of destroying the very purpose for which the courts on occasion invoke it. They seek to apply it here where no occasion exists.

### VIII.

#### THE SMALL ISLAND.

THE PRESENCE OF THE SMALL ISLAND, OR THE REMNANT THEREOF, IS NOT A CONTROLLING ELEMENT IN THIS CONTROVERSY. NO TITLE CAN BE OBTAINED TO IT BY POSSESSION OR OTHERWISE. THE TITLE TO IT IS IN THE STATE IN UNALIENABLE TRUST, THE SAME AS THE REST OF THE BED, IN SOVEREIGN CAPACITY. THE CASE IS NO DIFFERENT THAN THOUGH IT WAS ALL OPEN WATER.

This is the view the Government took of it when it improved the channel and scooped out a great part of the island, after which much of the rest of it disappeared. Had this island been in existence at the time the government surveyed and platted the lands, the Government might have surveyed it and it then would have been public land, subject to public disposal. If it had been in existence, small and inconsiderable in extent, and the Government had not seen fit to survey it and it had been shown on the Government plats or field notes of the lands adjoining the shore which it granted, then it might be said in the absence of fraud in the survey that the Government evinced no intention to retain ownership of it. The title would go to the state with the rest of its bed. In such case the adja-



cent shore owner might claim dominion over it to wharf out over it or use it in his improvements to reach navigable water. In such case we do not doubt the power of the Government to use it or remove it in making improvements in aid of navigation. Being out from the shore and not joined to it, we apprehend the Government could do this without the payment of compensation to any shore owner under such cases as *Scranton v. Wheeler*, 179 U. S. 141. Where the Government leaves such an island unsurveyed it cannot afterwards survey it and grant it in separate ownership after it has granted all the shore lands, for the title has already passed with the bed to the state. As the state took nothing in proprietary right and could convey nothing except rights in aid of navigation, it would have no different title or dominion as to the island than it holds over the residue of the bed of the waters. Only in case of the island being surveyed and passing to the state by some grant, as for instance the swamp land grant, would the state gain any proprietary interest in it.

We believe the above to state accurately the law on the subject applicable to this case. neither do we deny that under the doctrine of some states consistently adhered to, an unsurveyed island in a stream may be so situated as to be held to pass with the ownership of the shore as a negligible quantity. *Lettig v. Scott*, 107 Pac. 47. Perhaps it might be said in some of these cases that it was the intent to make the shore of the island the real shore. We have no occasion to combat cases which hold that the government in either case cannot go and make a subsequent survey and grant of such islands separately in the absence of fraud in the first survey.

Rossmiller v. State, 114 Wis. 169;



Hobart v. Hall, 174 Fed. 433; Appeal 186 Fed. 426;

Sherwood vs. Commissioners and State vs. Fishing and Shooting Club;

State vs. Venice of America Land Co., *supra*.

Many other of the cases which we have reviewed might be here cited, but it is unnecessary to repeat. Counsel for appellant on the argument below was asked whether he would make the same claim of right to intervene between the plaintiff and the navigable channel in the absence of an island, and he answered that he would. No other answer could fairly or logically have been made, for appellant claimed he owned the bed in fee and that this island belonged to him because he claimed it grew upon his bed, on what he claimed was on the Wisconsin side of the interstate boundary. Of course, all of this claim on the part of the appellant is based upon the contention that this is a stream. We content that it has been incontrovertibly established that this is an arm of the lake and that all of the Wisconsin decisions on the subject of ownership upon the shores of inland lakes and arms of the Great Lakes are applicable rather than cases relating to streams.

McLennan v. Prentice, 84 Wis. 444;

Diedrich v. N. W. U. Ry. Co., 42 Wis. 248;

Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214;

Prieve v. Wisconsin Land & Improvement Co., 93 Wis., 534;

Illinois Central Ry. Co. v. Illinois, 146 U. S. 387.

In the case of *Franzini v. Layland*, 120 Wis. 72, the court held that unsurveyed islands in navigable streams in that state are presumed to be appurtenant



to the surveyed land nearby, within the limits of which they fall as regards riparian rights, and nothing appearing to the contrary, that the same are presumed to pass with the conveyance of the surveyed land to which it is so appurtenant; but the facts admitted in the pleadings show that the island here involved was not in existence when the lands on the shore were surveyed and conveyed by the Government. It grew up on the bed. It seems axiomatic that no greater title could accrue under any kind of construction to a parcel of land thus rearing itself about the waters' level than the claimant had thereto while it was submerged. As the grant of lands by the Government in either of the states—Wisconsin or Minnesota—stopped at the waters' edge, no title thereto by state concession of a bed in the State of Wisconsin, even if this be held to be in the stream, is of such a proprietary character as to carry the title to a subsequently formed island thereon.

In the case of *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. Rep. 855, and on application for a rehearing 85 N. W. Rep. 402, there was involved a controversy over what is known as Jones Island. The record was not very satisfactory to the court. The action was ejectment. The answer pleaded the statute of limitations. The evidence on the part of the defendant was to the effect that in 1872, therefore and thereafter, except as artificially changed, the territory called Jones Island, which includes the premises in controversy, was covered by the waters of Lake Michigan, or an arm of the lake partaking of its character, or by some expanse of water governed by the law relating to the title to beds of lakes and ponds, and that the premises were formerly a part of such submerged lands. A man by the name of Truker, at the time specifically stated, had a house upon the submerged territory, supported in some way in the shallowest part,



resting on a piece of made land. He pretended to exercise dominion over the territory and prevented any person from locating thereon without his permission. He sold his house and claim of title to Jacob Muza in 1872, making no paper transfer of the property however. There were then several settlers on the island. Muza took possession, such as was possible under the circumstances, and thereafter asserted dominion over the same in the same manner as his predecessor had done. There was testimony showing that the entire territory was covered with water in 1855. The record was made exhibiting a patent either from the United States or from the state, which it was claimed included this submerged land or some portion of it. Justice Marshall, in deciding the case said:

"Now if such indicated facts are the truth of the matter, the land belongs to the State of Wisconsin, regardless of whether the United States or the State has in form transferred it to private ownership. The law in that regard is too well settled to warrant a discussion of it here. This court has been over the whole subject many times in recent years. The title to the beds of all lakes and ponds and all rivers navigable in fact as well, up to the line of ordinary high water mark within the boundaries of the state became vested in it at the instant of its admission into the Union, in trust to hold the same, so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds or rivers to the same extent that the public are entitled to enjoy tidal waters at common law. A patent from the United States, so far as it purports to cover any of such lands, whether made before the state was admitted into the Union or thereafter, is ineffectual. It has been so repeatedly held. A government patent of land bordering on a lake or pond, regardless of the boundaries thereof, according to the government survey, does not convey title to the lands below the line of ordinary high water mark. The United States never had title in the Northwest Territory, out of which this state was carved, to the beds of lakes, ponds and navigable rivers, except in trust



for public purposes, and its trust in that regard was transferred to the state and must there continue forever, so far as necessary to the enjoyment thereof by the people of this Commonwealth. Whatever concession the state may make, without violating the essentials of the trust, it has been held that, by long established judicial policy, which has become a rule of property, a qualified title to submergd lands or rivers navigable in fact has been conceded to the owners of the shore; otherwise the title to lands under all public waters is in the state and it is powerless to change it. It cannot transfer such title by grant or otherwise; nor can title thereto be obtained by adverse possession\*\*\* No private ownership has been conceded which displaces or materially affects such public rights. As to that, the state has not abdicated and cannot abdicate its trust. There is no need of enlarging upon this matter. As before indicated, this court has in recent years several times declared the law as here stated, grounding such declaration upon indisputable principles and the law as laid down on the subject by the Supreme Court of the United States."

#### Citing

McLennan v. Prentice, 85 Wis. 427,  
Willow River Club v. Wade 100 Wis. 86,  
and other Wisconsin cases, and  
Railroad Co. v. Schurmeier, 7 Wall. 272,  
Illinois Cent. Ry. Co. v. Illinois, 146 U. S. 387,  
Yates v. Milwaukee, 10 Wall. 497.

This case is a direct authority, as we understand it, both upon the proposition that the title to a subsequently accrued island would vest in the state, or rather remained vested in the state where it had been while the land was submerged, and, further, that no rights could be acquired thereto by a squatter thereon, and, especially taken into consideration with the decisions which we have before reviewed, we think the case must be said to so decide whether streams or lakes are involved, and that under this authority no ownership in such an island could be claimed



by a riparian owner in either state beyond his ordinary riparian rights. Not even the fiction of qualified title by state concession has any application to islands in the lakes.

If these are the waters of the Great Lake, or an arm, bay or inlet thereof, whether the island was in existence when the survey was made or grew subsequently thereto, the title would be vested in the state as the rest of the bed. No different title could accrue by its rearing itself above the surface of the water than existed before, to the bed. The authorities in the State of Michigan as to such islands here become applicable and of enhanced force in view of the Michigan doctrine as to streams.

Sherwood v. Comm'r State Land Office, 112 Mich. 227;

Olds v. Comm'r State Land Office, 112 N. W. Rep. (Mich.) 957;

People v. Warner, 116 Mich. 239; s. c. 74 N. W. 705-710;

Holman v. Rogers, 38 L. R. A. 673 (Ia.),  
and other cases cited under the preceding subdivision.

The case of *St. Louis v. Rutz* is not here controlling for in that case the decision was rested clearly, so far as relates to the point here in controversy, on the ground that in the State of Illinois the state had conferred the title in fee upon the riparian owner to the bed of the stream, and that if he owned the title in fee to the bed, then he owned an island which formed thereon. We contend that no shore proprietor in the State of Wisconsin owns any such title to the bed of such a stream.

It follows, then, from the foregoing authorities that neither the defendant Tallas nor any other squatter can acquire any ownership to such an island by squatting



upon it and claiming continued possession of it. He could not obtain it from the government for the government does not own it. He cannot get it from the state for the state has no proprietary ownership to part with. He can get no title by prescription against the government. He cannot get it by divesting Whiteside, for neither Whiteside nor his predecessor ever owned it. No public land could accrue upon the bed for the title had gone to the state in sovereign character. No private estate could grow upon the sovereign estate. The title is with the bed as a part of it and must remain there. The government rightly scooped out most of it. Tallas was no longer between Whiteside and the deepest navigable water. The parcel of the island left remaining on that side disappeared as the uncontradicted evidence showed. Tallas' cabin burned. He afterwards reconstructed it in another place and it may be supposed that he hopes to acquire the whole reef of land between the plaintiff's land and the navigable water. Whether such obstruction might ripen by lapse of time into a right to continue the same indefinitely we may not admit, but the same may be a matter of some doubt. It is no different, in our view, than though Tallas should go into the shallow water and construct his house upon pegs as the original one was constructed on the low, marshy land and reach the same by boat as his cabin is now reached.

Nor is Whiteside's claim any better than though he set up his claim to the bed under the water at that point. There is no title in fee in Whiteside and none awaiting Tallas's acquisition by prescription. The action is brought timely by the plaintiff and we submit the plaintiff had a right to have an adjudication by the court as to all of the parties, but the argument as to Tallas is made in another brief.

In the case of *Whittaker v. McBride*, 197 U. S. 510,



49 L. Ed. 857, the court refused to recognize any rights in a squatter or settler who undertook to gain rights in an island in the Platte River. The island had at one time been submerged. It was twenty-two acres in extent. The opposite shore owners had contended for it. The Nebraska court ran the *filum aquae* of the river through it and divided it between them and put the squatter out, and the Supreme Court of the United States sustained it on the theory that the contention had been determined according to local law.

In *State v. Fishing Club*, 127 Mich. 580, hereinbefore referred to, the court said that title cannot be gained by adverse possession of lands held by the state.

## IX.

### THE GOVERNMENT IMPROVEMENT AND THE RIGHT OF ACCESS.

Under this head we mention a few of the contentions of respondent in their brief before the Circuit Court of Appeals which may be reviewed here and which we do not wish to leave unchallenged.

The arguments that we are seeking access to another channel and that we are seeking to take property belonging to respondent beg the whole question. The argument that we have the same access to the deep waterway through these waters that we formerly had is not founded on the facts. The argument that we are endeavoring to recoup a loss at the expense of respondent is specious, and the statement that we still have all the advantages of a deeper channel of water than the improved shipway is misleading. The improvement in these waters was not in the nature of an artificial channel, a new channel working a diversion of the waters and commerce from this channel. On the contrary, right through the middle of this channel or body of water the government deep-



ened and improved the navigable course. Ships no longer have to wind back and forth like the tacking of a yacht, seeking to follow the deepest places, but may keep on a steady course which crosses and recrosses the crooked path they would formerly have been obliged to take through this middle. The government improved the channel, improved the middle of the channel. The respondent is more benefitted than anybody else. He knows now, where the deep channel is and skirting along or around the entire body of his land as it does, this shipway may be reached from his premises all the way in front of them and in the main at a regular distance and by much less wharving or dredging than before. The petitioner has to go further in some places to reach this navigable water but the distance is more regular and, as in the case of respondent, not only is general navigation improved, but navigation and commerce in connection with these lands. Respondent, in fact rejoiced at his own improved condition, under the guise of a feigned grievance seeks to destroy the petitioner's enjoyment of riparian privileges by asserting his ownership of a fee title on the Minnesota side of the middle of this bay of Lake Superior, to what was subaqueous land, held always and now in sovereign capacity by the state. Suppose a few years hence, which is not unlikely, commerce on these waters will expand to such an extent that the government will deepen the bed of these entire bays clear up to the shores; what will become of the respondent's claim of fee ownership in the bed and in this speck of a marshy island?

These waters were required by the Ordinance of 1787 providing for the government of the Northwest Territory in accordance with the cession thereof, to be and remain public highways forever. The public generally and citizens of each state are not to be deprived of the benefits of such highway. The government did not reserve the power



to improve this highway solely for the benefit of the owner of Big Island.

The chart, Exhibit "9," shows the dredging material deposited along on the north side of the improved highway, and the chart and the evidence show that the government closed the old deep way for the protection of the improvement, and shrubbery has now grown on the embankment. There are three soundings in what was a deep hole north of this reef. Asked about them, Engineer Darling said they were old soundings made before the government improvement and they put them on the chart. A small boat could run its nose in there, perhaps, yet the counsel have argued to the court that petitioner has a finer channel than the improved one and that we have all the access to navigable water we are entitled to as embraced in our riparian rights. The filling has been poured over the prong of the original island and its form has become obliterated. The next sounding east of the three in question is four feet and the next one west is five feet in depth. Even the deep hole cannot be reached by any kind of a boat without going across the shoal water within the zone of riparian rights of other owners.

See Exhibit "9."

Also testimony G. A. Taylor, pp. 87-89;

Testimony John H. Darling, F. 128, p. 71, also Fol. 224, 225, pp. 120 and 121.

Testimony W. E. Richardson, pp. 107-109 and 112.

Mr. Darling testified to those soundings being old soundings, that the dredging had largely filled up the whole channel and that it was not deemed expedient to keep it open,



Mr. Richardson, who has charge of this property and has visited it frequently over a course of years, testified that there had been filling on both sides of the easterly end of the original island, and the prong was widened. At the westerly end the whole channel was filled up entirely and that the residue is about half the depth it formerly was. That the island was useable for no valuable purpose except in connection with the shore, and the reef and island intervened between the plaintiff's land and the navigable water.

As to the right of access all the cases reviewed in Subdivision VI hereof are decisive. Another somewhat unworthy argument is the suggestion frequently made that these improvements are made just where some engineer chooses to dig. The full power was reserved in the government. That power is exercised by congressional authority. The work is placed in charge of the War Department. A commission of expert government engineers examines the premises and makes reports and recommendations. The documents concerning these are all government public documents. A chart of the proposed improvement is made, certified and approved by the Secretary of War. The Rivers and Harbors Committee inspect the work, appropriations are made for it and the improvement is carried on by the Department of Government in which Congress has placed it and when the process is through it is about as completely authoritative governmental action as it is possible to have.

Counsel say, "There will have to be many small channels connecting with the main artery." Doubtless, but whether we seek to build a wharf or construct a connecting channel, they will come forth and claim that we cannot do it without paying tribute to them. We want the question settled before improvements are begun.



If the purpose of making these waters boundary waters, and preserving the same as a public highway, and reserving the rights of improvement and control in the general government, and vesting the title to the bed in the states is carried out and not defeated, then the petitioner has the right of access to the actual navigable waters in the middle of this bay without buying that right from the Wisconsin shore owner or being forever compelled to pay taxes in two states thereon.

The learned Judge who wrote the opinion for the Circuit Court of Appeals concluded that the mouth of Saint Louis river should be moved down to the narrows at Grassy Point, and gave no effect whatever to these cases and accorded no force to the controlling facts on the record which under these cases stamp these waters as those of an arm or bay of the great lake. Great stress was laid by counsel and by the learned Judge upon Nicollet's map, for that map showed a stream flowing into a smooth and regular end of the lake, but notwithstanding the court compromised on a point half way up the bay. A glance at the government land survey map in the record and reproduced in front of this brief should assist this court to arrive at a more correct conclusion.

## X.

### JURISDICTION.

The learned Circuit Court of Appeals held jurisdiction but cast some doubt upon the question. Unless we concede all of the premises the counsel for defendant Whitesides (respondent) have laid down, and we concede none of them, there is nothing in the jurisdictional question.

The locus in quo is in the waters of Lake Superior or an arm thereof; it is on the Minnesota side of the



middle of the navigable and navigated channel in this bay as it has existed some years before the action was brought and on the Minnesota side of the middle of the bay. There exists no reason or cause to claim it to be elsewhere.

We claim also if these are waters of a stream and not of the lake still the court had jurisdiction and that too without regard to where the interstate line may be located through these waters.

There is no dispute between these shore owners as to their ownership and possssion of their respective shore lands.

The petitioner (plaintiff) does not claim to own the title to the bed of these waters, nor to that parcel of the bed that grew out of the water called the little island.

The peitioner claims only riparian rights incident to his shore ownership, and claims that within such rights he is entitled to improve and reclaim in aid of navigation, and for the purposes of enjoying access from his shore property to the navigable and navigated channel through these waters out to the established dock line, and that such right of use extends over the island and the reef. The defendant disputes not his ownership of the shore or that he has riparian rights, but disputes the extent of them. The plaintiff is a resident of Kentucky and defendant of Minnesota but jurisdiction does not depend upon the diversity of citizenship. The cause arises under the constitution and laws of the United States.

The plaintiff brought this suit to have the extent of his riparian rights determined and to restrain the defendant from interference therewith. *Sullivan Timber Co. vs. City of Mobile*, 110 Fed., 186 is a case where



the City of Mobile claimed to own the soil under the Mobile River and plaintiff owned the shore land, and in the exercise of his riparian rights had wharfed out to the navigable water. The court on page 197 said:

"The title of the owner of the upland stops at the high-water mark. Such owner is a riparian owner, or proprietary owner, and possesses rights incident to such ownership. Such rights as access to the navigable water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier, for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public."

Illinois Central Ry. Co. v. Illinois, 146 U. S. 387.

Yates v. City of Milwaukee, 10 Wall. 497.

Webber v. Commissioners, 18 Wall. 64.

Gould on Waters Sec. 148.

On page 199 the court said:

"There is equity in the bill in that it seeks to protect the complainant's property, or proprietary rights as a riparian owner, from invasion or impairment, and to settle and quiet the exercise and enjoyment of the same."

The plaintiff's lands are in the district of Minnesota. All of the defendants reside in that district. There is no question as to the amount involved being more than required for jurisdiction, and upon the record of this cause and the authority upon which we submit it, it is confidently asserted that the trial court rightly held that it had jurisdiction. If the Federal Court of that district had not jurisdiction we do not think we can find a court that has.

The counsel for Respondent Whitesides frankly conceded in the court below as he should to be consis-



tent that the rights of Whitesides would be just the same whether this island were there or not. That he could intervene between us and the deep water and keep us out just the same.

In the Circuit Court of Appeals however a disposition was manifested to put more stress upon the island and the court seems to be impressed with the idea that this suit is to determine the ownership and recover possession of a tract of land. We had not so regarded it.

The decision of the Court of Appeals rests upon what we deem to be a narrow and technical view of the cause, the important questions involved having received scanty attention.

To say that a state line established at a certain place cannot be changed by act of Congress or by either state alone and that private ownership in land in one state does not extend beyond the state line is but an elementary statement.

To treat such a statement as so determinative of this controversy that plaintiff's bill should be dismissed does violence to the record and avoids the determination of the questions which we urge are controlling in this cause.

Is there anything to justify fixing the location of this submerged interstate line other than through the middle of this bay?

Is there any reason to place it other than between these dock lines through the improved fair way?

Is there any reason upon this record to say that these waters at the locus in quo are other than those of an arm or bay of the Great Lake?

Is there, can there be, any private title to the bed?



Is not the bay or channel the boundary, the practical boundary?

Is not the very purpose of making these waters a highway and retaining power over them, power to improve them in aid of navigation, to preserve the public interest, to protect the right of access from the respective shores and preserve to the citizens of each state and to each state the benefits of access to and enjoyment of the navigable and navigated portions of these waters?

Was it not in part to avoid just what is sought to be done by respondent in this instance?

Does not what respondent desires the court to hold, and does not the decision of the Circuit Court of Appeals defeat the very purpose of the reservation of this power by the general government?

Does the location of this submerged boundary line between sovereign ownerships on the bed cut off the right of access by shore owners to the navigable water, and to the fair way through this channel as improved by Federal reserved authority?

If no private title is held in these beds why must the boundary of an upland owner's estate be synonymous with the line of that which is held in sovereign capacity?

Upon this record and under the authorities cited, is this island held in any different way than the rest of the bed?

Why should anybody be allowed to get a title to it, simply because a spot of the bed has appeared out of water?

The title of these land owners was not derived from the state but from the general government. Neither



that government nor either state has ever recognized any private ownership of title to this spot.

If there can be no such ownership, if the title is in the state, or states, how can Tallas or any other squatter gain a title to it by squatting upon it, and saying he claims to own and is in possession. How can he divest the state's title?

Will any number of years of such occupancy be of any more effect than a single year?

Is the public interest of no consequence in this matter? Is it not an obviously just and wise conclusion of the whole matter to leave the boundary to run through the middle in which case it will run through the channel as improved?

That would leave everybody in either state including the shore owners with the full enjoyment of all their rights, without any controversy on their hands and with the privilege of minding their own business.

If not this then is there any reason to cut off a shore owner from access to the navigable part of these waters without regard to the location of such boundary in the bed?

We maintain that this piece of the bed which has reared itself into an island is no more obstructive to such access and enjoyment than though it had not appeared or than it will be when it again becomes submerged, or as the part south of the channel has already done, moves away. It is within the zone of plaintiff's riparian rights. It is no different than so much shoal water.

These questions we feel cannot be disposed of on the basis of settling the line between two Iowa farms.



## XI.

AS TO THE DISMISSAL OF THE BILL AS  
AGAINST DEFENDANT TALLAS.

## XI.

The trial court although if sitting as a court of law would have decided against Tallas, dismissed the bill as to him and relegated us to the law side of the court to try the same thing over to the same judge.

The appellate court sustained this part of the trial court's determination. Naturally since that court took the view of the case which it did.

We may be wrong. We ought to be as two eminent courts have held against us. This court will doubtless say at once whether we are and will not care for discussion of the matter.

Rule 23 of the Rules of Equity promulgated in 1912 gives some encouragement for submitting a few statements.

The plaintiff being the owner and in possession of the Minnesota shore lands brought this suit in equity to have his riparian rights determined and to have it adjudged that he had the right as incidental to the shore ownership to reach out in front of his property to the dock line to have access to the navigable improved deep water channel in front of his premises, and claimed that he was obstructed in such enjoyment by the defendants, and that the defendant's claim of right to so obstruct the enjoyment of his riparian rights, if persisted and sustained, would operate to place the defendants and their ownership between the plaintiff and his estate and the navigable channel through said waters, and depreciate the value of his estate and deprive him of his rights and privileges appurtenant thereto which he alleged constituted the greater part of the value of his estate, and that the



occupancy of defendant Tallas and the claims of the several defendants worked a cloud upon the plaintiff's title and estate.

The defendants answered on the merits separately and by separate counsel. A special examiner was appointed to take the testimony. The defendant Tallas asked for affirmative relief although he did not file a cross bill. A number of days were consumed in the taking of evidence. Counsel for the plaintiff and for the several defendants appeared throughout, counsel for defendant Tallas participating in the examination of witnesses. Stipulations were made as to certain facts and as to the receipt in evidence of documents, both in behalf of plaintiff and defendants, and for the setting down of the case for trial. (See pages 127 and 38, and also "Exhibit 10" referred to on page 44 of the transcript.)

On the hearing before the master or special examiner, counsel for the defendant Tallas against the objection of the plaintiff proved by the said defendant by answers given in monosyllables that at the time of the beginning of this suit he was living on the island, claiming exclusive possession and ownership of it. No proof of title or of ownership was tendered and under the law it is clear that no ownership of the island could have ever been acquired. Upon the report of the examiner the cause came on for argument before the court, pursuant to the stipulation on page 38 and the order of the court made thereon at the top of page 39 of the transcript. When the case came on for argument and was called, counsel for the defendant Tallas entered an objection to the jurisdiction of the court sitting in equity on the ground that in view of the pleadings and proof it appeared that Tallas was in possession, claiming the ownership of the island, and that jurisdiction was barred by Section 723, R. S. of U. S., and by the seventh amendment to the



Constitution of the United States because plaintiff has adequate remedy at law by ejectment and moved that the court dismiss the bill as to the defendant Tallas upon said grounds. (See top of page 40 of transcript.)

The cause then proceeded to argument upon the merits, counsel for defendant Tallas occupying in the argument a considerable portion of three (3) days. (See page 42 of the transcript.) At the conclusion of the arguments the court indicated orally its decision to be in favor of the complainant as to his contentions against the defendants Whiteside and Alexander and in favor of the dismissal of the bill against defendant Tallas and directed the solicitors for the complainant to prepare a decree accordingly and submit the same to the court. (See page 43 of the transcript.)

This action was not primarily an action to determine the title to the bed of navigable water nor to an island which grew upon it. The action, based upon the undisputed and admitted ownership of the plaintiff's shore lands, as to his possession and right of possession of which there is no dispute, was brought to determine the extent, in view of all of the complicated circumstances of the cause, involving both law and fact, of the riparian rights incidental and appurtenant to such shore ownership, such rights in many respects, in view of the peculiar facts and circumstances, resting upon principles of equity.

The plaintiff, as in the case of *Sullivan Timber Co. v. Mobile*, 110 Fed. 186, did not claim ownership of the bed nor of any island that grew upon it. In the Sullivan case the plaintiff had not utilized, by improvement, all of its riparian rights and privileges.

The plaintiff doubted whether such title could be claimed to be vested in him with respect to an island grown upon the bed, the title to which is held to be in



the state, as would support a simple action in ejectment, but whether it would or not on the ground of right of exclusive possession and use, subject to the public rights, this action is properly one of an equitable character to determine the extent of plaintiff's riparian rights, a determination distinctly for a court of equity rather than for a court of law, a controversy which could not be determined by a jury but which, even if it occurred in an action where there was a jury, the court would have to determine and instruct the jury accordingly. Tallas was a proper party to the proceeding.

The action was against several defendants claiming certain rights, alleged to be an infringement of the plaintiff's riparian rights appurtenant to his shore ownership. As said before, the plaintiff's ownership and possession of the shore property was not in dispute but was admitted. The defendant Whiteside's ownership and possession of the shore property opposite this navigable water was not in dispute but was admitted. No question of their respective possession of their shore property was in controversy. As to all of the defendants except the defendant Tallas there is no claim made, even by the defendant Tallas, that the court of equity is without jurisdiction. The ownership of the shore property on either side is not in dispute. It is the extent of the riparian rights incidental and appurtenant to these respective properties that is in controversy.

There are several defendants. No question is raised by any of them, nor can there be, as to the jurisdiction of this court, so far as the nature of the action is concerned, except that attempted to be raised by counsel for the defendant Tallas. The defendant Tallas claims no right of interference and no right whatever



except such as he claims to have gained by occupancy. He has no muniment of title from the defendant Whiteside or anybody else, but claims to have succeeded by occupancy to rights which he claims Whiteside possessed. The defendant Alexander, through certain property owned by him, and the defendant Whiteside through certain property owned by him, and the defendant Tallas by virtue of his intrusion upon what he claims to have been the property of Whiteside, all claim rights that diminish the rights which the plaintiff claims he is entitled to enjoy by virtue of his admitted ownership of the shore lands which lie within this district. The main issue is between the plaintiff and the defendants Whiteside and Alexander; the issue with Tallas is incidental by virtue of the limited occupancy shown. The whole question could not be determined in an action between the plaintiff and the defendant Tallas. It takes all of these parties to determine the questions involved, and even if this action should be held to be one in the nature of a bill of peace, which the counsel for Tallas choose to call it, the number of parties defendant and the character of their interests or claims are such as to bring the same within the first class mentioned by the court in *Boston v. Montana*, 188 U. S. 632, viz: "One bought for the purpose of establishing a general right between a single part and numerous persons claiming distinct and individual interests." But, without limiting the matter to the statement of any narrow rule, a court of equity should not require a party plaintiff to bring repeated actions in order to secure and protect his rights, where all of the rights of all of the parties can be determined in a single act in equity, and here the jurisdiction of the court of equity was necessarily invoked in order to determine the questions involved, admittedly even by counsel for defendant Tallas, as to all except his client.



Upon the construction of the law applicable to the facts in this case, as established on the record, the court must of necessity hold that the defendant Tallas could gain no title to the portion of the island in question remaining, by occupancy, nor was there any one from whom he could acquire it adversely to the other parties to the suit. Such was the view of the trial court as expressed in

Hobart v. Hall, 174 Fed. 433. (Affirmed in 186 Fed. 426.)

Because, therefore, he says, "I am in possession claiming to own" can he thereby rob this court of equity of jurisdiction which it had of the parties and subject matter and rob it of the power and duty to determine this cause upon its merits and compel plaintiff to try two law suits before this same court to accomplish what could as readily be reached in one? If so, then Federal procedure needs reformation.

At the beginning of this discussion as to parties in 16th Cyc. p. 181 it is stated:

"The fundamental rule as to parties to suits in equity is that however numerous they may be, all persons interested in the subject of the suit and its results should be made parties. The reason for the rule is the aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order perfectly safe to those who have to obey it, and to prevent further litigation."

In *Minnesota v. Northern Securities Company*, Book 46 Lawyers' Edition, United States Supreme Court Reports on page 515, Mr. Justice Shiras said:



"The general rule in equity is that all persons materially interested either legally or beneficially in the subject matter of a suit are to be made parties to it so that there may be a complete decree which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of the multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits."

In *Kelly v. Boettcher*, 85 Federal, on page 64, Mr. Justice Sanborn stated that a proper party is one who has an interest in the subject matter of the litigation which may be conveniently settled therein.

The defendant Tallas answered on the merits and either admitted or put in issue the allegations of the bill of complaint and asked for affirmative relief, which he might properly ask for as against the plaintiff, but which he could not ask for as against his co-defendants without a cross bill. He entered no demurrer, made no plea to the jurisdiction in his answer, except a plea on another and wholly ineffectual ground which he did not urge, viz: for want of further parties plaintiff. He participated in all of the proceedings before the Special Examiner, entered into all of the stipulations, cross-examined witnesses, and never raised this question until the final arguments after the cause was submitted to the court upon the record.

We submit that it was too late to raise such objection and that the court should have disregarded it and that there is no reason apparent upon such objection why the court should discontinue its jurisdiction of this case as to Tallas, send him hence and require the plaintiff, after all of the labor and expense incurred,



to proceed again in the other side of the court to establish the same facts.

Upon these questions we submit without comment the following authorities:

Pomeroy's Equity Jurisprudence, Vol. 1, Sec. 180-181.

United States v. Union Pac. Ry. Co. and Western Union Tel. Co., 160 U. S. 1, 40 L. Ed. 319.

Coosaw Mining Co. v. South Carolina, 144 U. S. 555, L. Ed. 537.

Still Assignee v. Solbert, 6 Fed. 468.

Leighton v. Young, 52 Fed. 439.

Union Mill & Mining Co. v. Danberg, 81 Fed. at page 86.

The Estate of James Foster, 15 Hun. page 387.

Daniell's Chancery Pr., Vol. 1, 6th Am. Ed., page 556.

Lewis v. Cocks, 90 U. S. 23 L. Ed. 70.

Hipp v. Babin, 19 How. 278.

Killian v. Ebbinghaus, 110 U. S. 568.

Boyce v. Grundy, 3 Peters 215.

Oelrichs v. Williams, 82 U. S. 211.

Hapgood v. Berry, 157 Fed. 807.

Zimmerman v. Carpenter, 84 Fed. 747.

Underhill v. Van Cortlandt, 2 John Ch. 369.

Attorney General v. Purmort, 5 Paige 625.

Cutting v. Dana, 25 N. J. Eq. 265.

Clark v. Flint, 22 Pick. 231.

Grandin et al v. LeRoy & Smyth, 2 Paige 508.

Schoolfield v. Rhodes et al., 82 Fed. 153.

Toledo Computing Scale Co. v. Computing Scale Co., 142 Fed. 919.

Consolidated Roller Mill Co. v. Coombs, 39 Fed. 25.

Diedrich v. Fox, 56 Fed. 714.

Perego v. Dodge, 163 U. S. 160, 41 L. Ed. 113.



It is suggested that the objection of defendant Tallas to the jurisdiction of the court to determine the cause as to him, came too late and had been waived.

The following cases are referred to without discussion:

- Wylie v. Cox, 15 How. 415, 14 L. Ed. 753.
- Kilbourn v. Sutherland, 130 U. S. 505, 32 L. Ed. 1005.
- Cummings v. The Mayor, 11 Paige Ch. 596.
- Levi v. Evans, 57 Fed. 680.
- Brown, Bonnell & Co. v. Lake Superior Iron Company, 134 U. S. 530.
- Kaufman v. Wiener, 48 N. E. 479.
- Freeland v. Wright, 28 N. E. Rep. 678 (Mass.)
- Harding v. Olson, 52 N. E. 482 (Sup. Ct. Ill.)
- Ward v. Todd, 103 U. S. 327.
- Green v. Turner, 98 Fed. 756.

The defendant Tallas answered to the merits, asked affirmative relief, participated in the introduction of evidence, and speculated upon the proceedings and concluded to run to cover and try to get out from under the jurisdiction of the court.

We submit that the court should have retained jurisdiction of all of the parties and made one complete adjudication of the whole case and not relegate the plaintiff to the necessity of bringing an action at law on this one matter against this one defendant after his cause has been fully submitted to the court on the merits, upon which submission it is apparent to the court that the plaintiff is entitled to the relief sought. The plaintiff should not be required to again pursue this litigation in an action at law to secure what he is entitled to as shown in this cause. The decree of the court in equity is enforceable and it can give to the



plaintiff all of the remedy that he requires and in it justice may be done to all of the parties without another trial. We submit that coincident with this power it was the duty of the court to have entered such a decree.

## XII.

### AS TO FINALITY OF THE DECREE OF THE CIRCUIT COURT OF APPEALS.

We do not suppose the court desires us to discuss this subject.

We have supposed that this cause was one which arose under the Constitution and laws of the United States, that the *whole* bill as well as specific allegations showed it so, and that for this reason the Federal Court had jurisdiction.

There was also diversity of citizenship.

By reason of questions involved we have supposed parties desiring to appeal could have appealed either direct to the Supreme Court or to the Circuit Court of Appeals.

Whiteside having appealed to the Circuit Court of Appeals, the plaintiff Norton took to the same court an appeal from that part of the decree dismissing the bill as to Tallas.

We have supposed that in a cause so arising the judgment of the Circuit Court of Appeals is not final, and that an appeal lies therefore to the Supreme Court of the United States and we have so appealed.

The interests involved however, are so great that even if such decree would otherwise be final, this court under the Judiciary Act having power to review it upon certiorari, we believe would so review it upon application.



In order surely to protect our clients and not allow his interests to suffer by reason of any mistake of ours in construing these statutes of procedure we have made application for the writ.

American Con. Co. v. R. Co. 148 U. S. 372.

McLish v. Roff 141 U. S. 661.

Howard v. U. S. 184 U. S. 681.

Huguley v. Galetton's Cotton Mills 184 U. S. 294.

Union Pac. R. Co. v. Harris, 158 U. S. 326.

Sonnentheil v. Brewing Co. 172 U. S. 401.

Union etc. Bank v. Memphis, 189 U. S. 71.

Whether it be upon certiorari or appeal it is earnestly desired that the whole case be determined by this court. The record has been sent up.

Respectfully submitted.

Duluth, January 23, 1914.

JED L. WASHBURN,

WILLIAM D. BAILEY,

OSCAR MITCHELL,

ALBERT C. GILLETTE,

Solicitors and of Counsel for Petitioner.



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# SUPREME COURT

OF THE  
**United States**

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OCTOBER TERM, 1913.

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GEORGE W. NORTON, as Executor  
and Trustee of the Estate of  
GEORGE W. NORTON, deceased,  
—vs.—  
ROBERT B. WHITESIDE,

Petitioner,  
  
Respondent.

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**Brief for Respondent Robert B. Whiteside, in  
Opposition to the Application for a  
Writ of Certiorari.**

The petitioner herein has made an application to this Court for a writ of *certiorari*, directed to the Circuit Court of Appeals for the Eighth Circuit, to review the decision of the latter Court, in the above entitled action, wherein it decided in favor of the respondent and against the petitioner.

It is incumbent upon the petitioner to clearly establish two things before he can show that he is entitled to the relief demanded.

First, he must show that he has no adequate remedy by writ of error or appeal to review the decree in question.

Second, he must not only show that he has



no adequate remedy by writ of error, or appeal, but also, and in addition, must clearly establish the fact that the circumstances surrounding this case bring it within the purview of those cases in which this Court has held that the writ of *certiorari* will lie.

If the petitioner fails to establish either one of these propositions the application for the writ must be denied.

The writ of *certiorari*, like the writs of mandamus, injunction and prohibition, is an extraordinary remedy and will never be granted where there is a plain, speedy and adequate remedy at law.

It was never intended to operate as a substitute for a writ of error, or appeal; in fact, the peculiar province of this writ is to bring up for review the judgment, or decree, of an inferior Court, where no provision has been made by statute for reviewing such judgment, or decree, by writ of error or appeal.

Where there is an adequate remedy by writ of error, or appeal, the writ of *certiorari* will be denied.

In re Tampa Suburban R. Co., 168 U. S. 583.

In re Huguley Mfg. Co., 184 U. S. 297.

The petitioner in this case occupies the anomalous position of contending that the decree of the Circuit Court of Appeals is not final, and is appealable to this Court, and, at the same time, and after an appeal has been taken, of invoking



the exercise of the discretionary power of the Court to issue a writ of *certiorari*.

If, as counsel for petitioner contend, they have a remedy by appeal, then, certainly, it is not only not necessary, but would be highly improper to issue the writ, for the very purpose of the writ is to obtain the review of a cause that would not otherwise be reviewable.

We have been unable to find any decision of this Court where the question has been squarely raised and passed upon, as to whether a litigant could take an appeal, and, while the appeal was still pending *and relied upon*, could apply for and obtain a writ of *certiorari*. But in 6 Cyc., page 783, the following doctrine is laid down:

“The application must present some sufficient reason for not resorting to appeal, or some other and appropriate and available remedy, and must state facts showing the inability to take or perfect an appeal in time, except where an appeal is a concurrent remedy.”

The above doctrine is sustained by the following authorities:

State vs. Olson, 56 Minn. 210.

Doan vs. Sibbitt, 61 Ill. 485.

Detroit etc. R. Co. vs. Graham, 46 Mich. 642.

Barton Ex parte, 70 N. C. 134.

In State vs. Olson, *supra*, on page 213, the Court says:



“Now, as he would have had this right of appeal to the District Court in case he claimed damages exceeding \$100, then, if the issuance of this writ is sustained, he would have two remedies,—one by appeal and one by writ of *certiorari*,—which the law does not permit. The burden was upon him to show by sufficient facts that he had no right of appeal or other remedy given by law, and failing to do so, the writ must be quashed.”

If the doctrine laid down by the above authorities is correct, it would appear that a party could not resort to the remedies by appeal and writ of *certiorari* at one and the same time. And yet that is just the situation in which the case at bar is in; the petitioner has taken an appeal and has had the record brought up under that appeal, and, without abandoning his appeal, has now applied for the issuance of the writ.

The effect of the proceeding is, therefore, to obtain the opinion of the Court on a question of practice,—that is as to whether petitioner’s proper remedy is by appeal, or by writ of *certiorari*.

We next come to a consideration of the question as to whether the petitioner is entitled to the writ, even though it be conceded that he has no remedy by appeal.

The fact that the applicant for the writ has no remedy by appeal is not the sole test as to whether the writ should issue. He must still show that the issues involved in the case are such as bring it within the class of cases which the Courts have held are entitled to be reviewed on writs of *certiorari*.



There is a distinction in the application of the rule as to when the writ of *certiorari* will be issued by the Supreme Court of the United States, and when it will be issued by the State Courts. In the former, the writ is not one of right, but rests entirely in the discretion of the Court; but in the State Courts, or at least in many of them, the writ is regarded as a writ of right, whenever the applicant shows that he has no adequate remedy by appeal, or writ of error. In Minnesota, for instance, the writ is practically regarded as a writ of right.

In Dunnell's Minnesota Digest, Sections 1393 and 1394, the following doctrine is laid down:

“The writ of *certiorari* is not a writ of right, its allowance being somewhat a matter of discretion. It should be denied where it would result in grave public detriment and inconvenience. It may be denied where the subject matter could be better litigated otherwise. But where the proceedings sought to be reviewed are of a strictly legal nature in a Court of law, and no other mode of appeal is provided, the writ is practically a writ of right in this State. *Certiorari* will always lie for the review of strictly judicial proceedings in a Court of law, if no other mode of appeal is provided by statute.”

And the doctrine quoted above is sustained in the following decisions:

Brown County vs. Winona etc. Co., 38 Minn. 397.

Sherwood vs. Duluth, 40 Minn. 22.



State vs. Probate Court, 51 Minn. 241.

In that state, therefore, there are only two things requisite to entitle the applicant to the issuance of the writ; first, that the subject matter to be reviewed is judicial, or *quasi* judicial, in its character, and, second, that there is no mode of review provided for by statute.

But, in an application to the Supreme Court of the United States for a writ of *certiorari*, the petitioner is required to go much farther. He must not only show that the subject matter sought to be reviewed is judicial in its character, and that no statutory mode of review is provided for, but, in addition to this, it must be shown that the questions involved are not ones of mere private interest, but of grave public concern, or that it is necessary for the questions involved to be passed upon by the Court of final resort, in order to avoid the confusion arising from conflicting decisions on the same question, rendered by inferior judicial tribunals.

The reason for the distinction as to the requisites required for the issuance of this writ by the Supreme Court of the United States and the Supreme Courts of the States is shown by a study of the necessity for the passage of the Act of March 3, 1891, creating the Circuit Courts of Appeal.

Prior to the passage of this Act, the Supreme Court was the only Federal appellate Court, and every case that could be brought in the inferior Federal Courts, with a few minor exceptions, could be appealed to the Supreme Court.



The rapid growth of litigation in the country brought such a large number of cases before this Court for review that it was impossible for the Court to keep pace with the growing docket and to give the time and consideration it should to cases of great public importance.

It was necessary, therefore, to devise some method of relief, and, consequently, the act creating the Circuit Courts of Appeal was passed.

This Act provided that the decision of these Circuit Courts of Appeal should be final in all cases, except with certain well defined exceptions. But the Act further provided that the Supreme Court might bring any case before it for review, by the writ of *certiorari*, even though the decision of the Circuit Court of Appeals was, by the terms of the Act, made final.

But unless the Supreme Court had placed some limitation upon the class of cases that could be brought before it for review, by the use of the writ of *certiorari*, the Court would have found itself in the same situation it was in before the passage of the Act, and the purpose of the Act would have been defeated.

The Court has from the first, therefore, laid it down, as a prerequisite to the issuance of this writ, that the exercise of the power to issue the writ will be sparingly exercised; that it will only be issued when it is necessary to avoid the confusion arising from conflicting decisions by inferior judicial tribunals, or where the importance of the questions involved are not those of mere private interest, but only those affecting the in-



terests of the nation in its internal or external relations.

Lau Ow Bew, Petitioner, 141 U. S. 587.

In re Woods, Petitioner, 143 U. S. 202.

American Con. Co. vs. R. Co., 148 U. S. 382.

Forsyth vs. Hammond, 166 U. S. 506.

Fields vs. United States, 205 U. S. 295.

United States vs. Reimer, 220 U. S. 547.

That this Court has kept constantly in mind the fact that the chief test as to whether or not the writ should issue is to be determined by the question as to whether or not the issues involved were ones of grave public importance, and not merely of private interest, is made manifest by an examination of the above authorities.

In *Lau Ow Bew*, *supra*, on page 587, the Court says:

“It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final, to be certified, can be properly invoked.”

And in *Forsyth vs. Hammond*, *supra*, on page 514, the Court says:

“We reaffirm in this case the propositions heretofore announced, to-wit, that the



power of this Court in *certiorari* extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that Court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

In *Fields vs. United States*, *supra*, on page 296, the Court says:

"However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of the State and Federal Courts or between those of Federal Courts of different circuits. There is nothing affecting the relations of this nation with foreign nations, and indeed no matter of general interest to the public."

Wherein, then does the petitioner in this case bring himself within the tests prescribed by this Court as necessary to exist in order to enable him to invoke the writ of *certiorari*?



There is no claim made by the petitioner that the decree sought to be reviewed is in conflict with any other decision either State or Federal.

In fact not only is there no showing that the decision sought to be reviewed is in conflict with any other decision State or Federal, but it can be affirmatively shown that the decision in question is in entire harmony with all previous decisions rendered on both the main issues involved in the case and on the subsidiary questions relating thereto.

The final and ultimate issue in the case before the Circuit Court of Appeals was whether the petitioner, Norton, or the respondent, Whiteside, had the right and title to the so-called "Tallas Island."

The respondent, Whiteside, contended that, under the law of the State of Wisconsin, the owner of the upland bordering on a navigable stream, was the owner of all islands formed on the bed of the stream and lying between the shore lands and the thread of the stream.

Under the decision of the Federal Courts, it has uniformly been held that where the United States makes a grant of lands, bordering on navigable streams, the question as to the nature and extent of the title of the shore owner in the bed of the stream is governed *solely* by the law of the State where the lands are located.

Barney vs. Keokuk, 94 U. S. 324.

Hardin vs. Jordan, 140 U. S. 341.

Hall vs. Hobart, 174 Fed. Rep. 439.



Under these decisions, therefore, it became necessary for the Circuit Court of Appeals to determine what was the nature and extent of the title of Whiteside in the so-called "Tallas Island," under the decisions of the Supreme Court of Wisconsin.

The Supreme Court of that state has held that a grant of lands from the government, without reservation, of lands on the bank of a navigable stream, vests in the purchaser the title to any unsurveyed lands lying between the main land and the centre of the stream.

Chandos vs. Mack, 77 Wis. 573.

Franzini vs. Layland, 120 Wis. 72.

Sliter vs. Carpenter, 123 Wis. 578.

Farris vs. Bentley, 141 Wis. 671.

The decision here sought to be reviewed, therefore, holding as it did that the title to the so-called "Tallas Island" was in the respondent Whiteside, was not only not in conflict with other decisions, but was in entire harmony with the decisions of the Supreme Court of Wisconsin on this question, and also with the decisions of this Court holding that such questions are to be determined *solely* by the law of the State where the lands are located.

The decree sought to be reviewed, therefore, is certainly not in conflict with any other decisions on the main issue in the case.

One of the subsidiary questions involved in this case was whether the boundary line between the States of Minnesota and Wisconsin had been



shifted by the dredging of the artificial channel south of the middle of the main, natural channel of the St. Louis river.

The trial court in deciding the case held that, up to the time the artificial channel was constructed, Whiteside's rights extended to the middle of the old natural channel on the south, and that this included the so called "Tallas Island," and that Norton's rights only extended to the middle of the natural channel on the north side of the stream. But he further held that the dredging of the artificial channel by the government operated, in law, to shift the boundary line between the States from the old natural channel to the new, artificial channel, and that the effect of this was to deprive Whiteside of property rights to which he had theretofore been entitled, and to confer upon Norton property rights to which he had theretofore not been entitled.

See Record Fol. 262.

In other words the trial court held that the government could, by dredging an artificial channel, not only shift the boundary line between States, but could also, by such action, transfer property rights from one person to another.

The respondent, Whiteside, on the other hand, contended that, when a boundary line between two States has been definitely fixed, that the only way in which the boundary line can be changed is either by the mutual agreement of the States, or by gradual and imperceptible changes brought about by *natural* causes. He contended further, that even if the change is brought about



by natural causes, if the change is instantaneous, or sudden, that such change does not in any way affect the boundary line between States, or property rights between individuals.

The above doctrine is fully sustained by the following cases:

Nebraska vs. Iowa, 143 U. S. 359.

Missouri vs. Nebraska, 196 U. S. 23.

Washington vs. Oregon, 211 U. S. 127.

State vs. Bowen, 149 Wis. 203.

In the case of Washington vs. Oregon, *supra*, the Court said:

“The northern boundary of the State of Oregon was established prior to that of the State of Washington, and it is not within the power of the national government to change that boundary without the consent of the State of Oregon.”

The Circuit Court of Appeals, therefore, in deciding, as it did, that the government had no power by dredging an artificial channel to change the boundary line between States, and had no power by such action to transfer the title that had already vested in one person to another, was in entire harmony with the decisions of this Court and of the Supreme Court of the State of Wisconsin.

Another one of the subsidiary questions raised in this case was that the boundary line between the two States, in the body of water separating the lands of the petitioner Norton, and the respondent Whiteside, was not the middle of the



*main channel* of such body of water, but was the middle of the body of water itself, measured from shore to shore.

The respondent Whiteside contended that the body of water separating the lands of the litigants was the St. Louis River, and as the terms of the enabling act, admitting the State of Wisconsin, defined the boundary between the two States to be the *middle of the main channel* of the St. Louis river, he contended that the boundary line in the body of water separating the lands of the parties was the middle of the main channel.

The petitioner Norton, on the other hand, maintained that the body of water separating the lands of the parties to the action was not the St. Louis river, but was an arm of Lake Superior, and that, consequently, the terms of the Enabling Act, defining the boundary as the middle of the main channel of the St. Louis river, did not apply to the *locus in quo*.

Both the trial Court and the Circuit Court of Appeals decided that the body of water separating the lands of the petitioner and the respondent was the St. Louis river. But the respondent Whiteside contended further that, even if it be conceded that the body of water at the *locus in quo* was not the St. Louis river, but was an arm of Lake Superior, that the boundary line was, nevertheless, in the middle of the main channel of the body of water separating the two States.

This contention was based upon the doctrine that where a stream forms a boundary line between two States, it is the universal policy of the



law to adopt the middle of the main channel as the boundary line, and this regardless of the fact as to whether the terms of the Enabling Acts have defined the boundary as the middle of the body of water, or as the middle of the main channel, and also regardless of the fact as to whether the body of water separating the States is a navigable river, or a strait, sound, or arm of the sea.

In support of this proposition, we cited:

Iowa vs. Illinois, 147 U. S. 1.

Louisiana vs. Mississippi,, 202 U. S. 1.

In both these cases the Enabling Acts defined the boundary line to be the *middle* of the body of water, but, notwithstanding this, the Courts held that the boundary line was the *middle of the main channel*.

In the case of Louisiana vs. Mississippi, a part of the boundary line ran through certain straits and sounds, but the Court held that in respect to boundary lines between States the doctrine of the *Thalweg* was applicable to sounds, straits and arms of the sea, as well as to navigable rivers.

The Circuit Court of Appeals in the case at bar, therefore, in holding, as it did, that the boundary line was the middle of the main channel of the body of water, separating the lands of the petitioner and respondent, was in harmony with the decisions of this Court.

From the foregoing it is apparent that the petitioner is not entitled to the writ of *certiorari* on the ground that the decision sought to be reviewed is in conflict with the decisions of Courts



of other jurisdictions, for not only is there no such showing, but we have affirmatively shown that the said decision is in harmony with the decisions of both the State and Federal Courts, and that also, not alone in regard to the main issue in the case, but with reference to all subsidiary and incidental questions raised.

In the forepart of this brief, we cited the decisions of this Court holding that the writ of *certiorari* would only be issued where there was a conflict in the decisions of inferior tribunals, or in cases involving matters of grave public importance "affecting the interests of this nation in its internal or external relations."

Having shown that there are no grounds for issuing the writ on the ground of conflicting decisions, we are next brought to a consideration of the question whether the decision sought to be reviewed is one involving matters of grave public importance, affecting the interests of this nation in its internal or external relations.

The respondent contends that the issues involved in the case at bar are those merely of private rights, and not of grave, public importance affecting the interests of the nation at large.

A reading of the bill of complaint and the answer in this case will show that this action was brought merely for the purpose of testing the question of petitioner's riparian rights and of determining whether petitioner or the responder had the better right and title to the so-called "Tallas Island."

The action, therefore, was strictly one to se



tle and determine private property rights, and the decision on this question is no more entitled to be reviewed on a writ of *certiorari*, than is any other case involving the title to real estate.

This Court has uniformly held that where the United States makes a grant of lands, bordering on navigable streams, the question as to the nature and extent of the title of the shore owner, in the bed of the stream, is governed *solely* by the law of the State where the lands are located.

Barney vs. Keokuk, 94 U. S. 324.

Hardin vs. Jordan, 140 U. S. 341.

If the issue involved in this case, then, was purely one of *local* law, it certainly does not come within the purview of those cases that are entitled to be reviewed on writs of *certiorari*, for it is not one affecting the interests of the nation at large.

But counsel in their brief, on pages from 15 to 18, say that there were a large number of incidental and subsidiary questions involved in the decision of the Circuit Court of Appeals which entitles the petitioner to have the decree reviewed by writ of *certiorari*.

First, they say the decision is one of great importance to the parties to the action and to others similarly situated.

But every case is regarded as a matter of importance by the litigants, *and every decision of a Court*, while it only binds those who are parties to the action, nevertheless, lays down a rule of property, or a regulation as to personal rights, that affects "others similarly situated."



If this is to be regarded as a test, there never would be a case brought before a Circuit Court of Appeals that could not be reviewed on a writ of *certiorari*.

But counsel refer to certain other incidental and subsidiary questions involved in the case, which they seem to regard as matters of grave importance, affecting the interests of the public at large.

They say that the decision of the Circuit Court of Appeals involves a holding as to the boundary line between the States of Minnesota and Wisconsin, and that it is likely to result in conflict between the respective States, with reference to the exercise of the police and taxing powers. They also allege that the Court erred in certain respects in construing the terms of the Enabling Acts admitting the States of Wisconsin and Minnesota.

In reply to this the respondent says, that the decree sought to be reviewed has been in full force and effect for nearly a year, and there is no showing that it has resulted in any conflict or confusion between the States, in the exercise of any of their respective powers, or that either of said States has made any move, or commenced any action, since said decision was rendered, to obtain a result varying in any respect from the holding of the Circuit Court of Appeals.

So far as appears, the fears of counsel as to the dire results that will follow this decision to the States of Minnesota and Wisconsin are entirely imaginary and anticipatory, and are not



entertained by the States, for neither of them has taken any action to avert the result, and presumably, therefore, the decision rendered by the Court is in conformity with the views of the States themselves.

We would further suggest, in reply, that the decision in question is not *res adjudicata* as to either of the States; that if any question of difference of opinion, as to the proper location of the boundary line between the two States, should arise, the proper way to settle that question is by an original action brought in this Court between the States as parties.

It seems to us that it would be highly improper for the Court, in an action involving mere private property rights, to determine matters of such momentous importance to these States, as the questions as to the limits of their respective jurisdictions, and as to the exercise of their police and taxing powers.

Whenever matters of such vital importance as these are passed upon, it should be in an action in which the States themselves are represented, and are afforded an opportunity of presenting both the facts and the law upon which they rely.

But, counsel may ask, if it was proper for the Circuit Court of Appeals to pass upon the question of the boundary line between the States, why is it improper for this Court to pass upon the same question?

The answer is that the question is presented in an entirely different way and form to the two Courts, and the two decisions, if one should be



rendered by this Court, would be made upon different issues and would be entirely different in their scope and effect.

The question presented to the Circuit Court of Appeals, and the question *decided* by that Court, was simply, where is the boundary line between the estates of the petitioner and the respondent?

It is true, that, as incidental to the determination of this question, the Court passed upon the boundary line between the two States, but, in so doing, it did not, *as between the States of Minnesota and Wisconsin*, determine the boundary line between the two, and did not pass upon, or decide any questions affecting the police or taxing powers of the respective states.

In other words, the question presented to the Circuit Court of Appeals, and the question *decided* by that Court, was merely to determine where the boundary line between two private estates was located.

But the question presented to this Court, *as a ground for review*, is not where is the boundary line between the estates of petitioner and respondent, *but where is the boundary line between the States of Minnesota and Wisconsin*.

Counsel for petitioner well know, and the authorities are unanimous on the point, that, if the question here presented for review, was the ordinary one as to the proper location of the boundary line between private estates, that *certiorari* would not lie.

But, counsel say, that, in deciding where the



boundary line between the private estates was located, the lower Court incidentally passed upon the question as to where the boundary line between the States was located, and that it erred in its decision on this latter point, and they, therefore, ask this Court to review the decision and reverse it, *upon the ground that the lower Court erred in its decision as to the proper location of the bounadry line between the States.*

In other words, in an action, merely affecting interests in private estates, this Court is asked to *directly* pass upon and *decide* questions affecting the proper location of the boundary line between States, and to pass upon and decide questions as to the exercise of their police and taxing powers.

If this Court should pass upon and decide the question that is *directly* presented to it for review, that is, where is the proper location of the boundary line between the States of Minnesota and Wisconsin, while its decision would not be *res adjudicata* as between the States, nevertheless, it would be an *authority* on that question, if it should ever be raised, and we contend that a question of this kind should not be passed upon and decided, except in an action where the States themselves are parties to the action.

We contend, therefore, that the decision here sought to be reviewed is not one affecting public interests, but merely determining private property rights, and that such questions cannot be reviewed in this Court on a writ of *certiorari*.

But there is another answer to the position taken by counsel as to the right of this Court to



review, by *certiorari*, these incidental and subsidiary questions which counsel claim affect the interests of the public at large.

The things that they complain about are that the lower Court erred in determining the boundary line between the States, and in construing the enabling acts admitting the States.

These are matters arising under the laws and Constitution of the United States, and involve Federal questions, and, if they can be reviewed by this Court at all, under the facts and circumstances as they arise in the case at bar, then they can be reviewed on appeal.

But, as pointed out in the fore part of this brief, questions that can be reviewed on appeal cannot be reviewed by *certiorari*. The province of the writ of *certiorari* is to enable Courts to review cases that cannot be reviewed on appeal, or by writ of error.

On page 17 of their brief, counsel give as their seventh reason why this case should be reviewed by this Court, that the effect of the holding of the Circuit Court of Appeals was to cut off and deprive the petitioner of all his riparian rights.

While we do not consider that this statement, if true, would entitle the petitioner to have this case reviewed by *certiorari*, for it raises simply a question of private and not public interest, nevertheless, we do not feel like allowing the statement to go unchallenged.

The evidence, *introduced by the petitioner himself on the trial*, showed that he had substan-



tially the same riparian rights at the time of the trial that he had at the time the shore lands he owns were patented.

Plaintiff's exhibits 6 and 9 show the depth, by government soundings, of both the old, original channel, which is immediately in front of plaintiff's lands, and the depth of the artificial channel which he seeks the right to reach.

These exhibits show that the depth of water in the old, original channel, immediately in front of his lands, is from 23 to 31 feet, and that the depth of the artificial channel is from 19 to 21 feet.

Furthermore, these exhibits show that this old, original channel opens into the artificial channel a few hundred feet east of plaintiff's property, thus giving him access to the artificial channel.

The oral evidence on the trial showed that the old, original channel was substantially in the same condition that it always had been.

The witness, Richardson, testifying for the plaintiff, did state that the old, original channel had to some extent, to him unknown, been filled up, but the effect of his testimony was nullified by the fact that, on cross examination, he admitted he had made no measurements, and that his testimony was based upon opinion and hearsay. Record, Fols. 210, 222.

On the other hand, the witness, Taylor, who also testified for the plaintiff, and who is the assistant government engineer who had charge of the construction of the artificial channel, testified



that the old, original channel was substantially in the same condition it had always been, and that boats of the same draft could go into the old channel as could before the dredging of the artificial channel. Record, Fol. 167.

Our references to the record are to the record as used in the Court below, as we have been furnished with no copy of the record in this Court, but we assume they are the same.

Counsel for petitioner have, in their brief, argued this case at great length upon the merits of the question involved in the main case; but, as we have understood from an examination of the cases, and from direct inquiry of the Clerk of this Court, that the practice is that, upon an application for a writ of *certiorari*, the only question considered by the Court is the question as to whether the writ should issue, we have refrained from arguing the case on its merits, and have confined ourselves to the question as to whether the case presented is one which falls within the class where the issuance of such writ is permitted.

We respectfully submit that the petition should be denied.

ALFRED JAQUES,  
THEODORE T. HUDSON,  
LUTHER C. HARRIS,

Solicitors and of counsel for  
Respondent, Robert B. Whiteside.



# SUPREME COURT

## Of the United States.

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OCTOBER TERM, 1913.

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GEORGE W. NORTON, as Executor and Trustee of the Estate of GEORGE W. NORTON, Deceased,

Petitioner,

vs.

ANDREW J. TALLAS,

Respondent.

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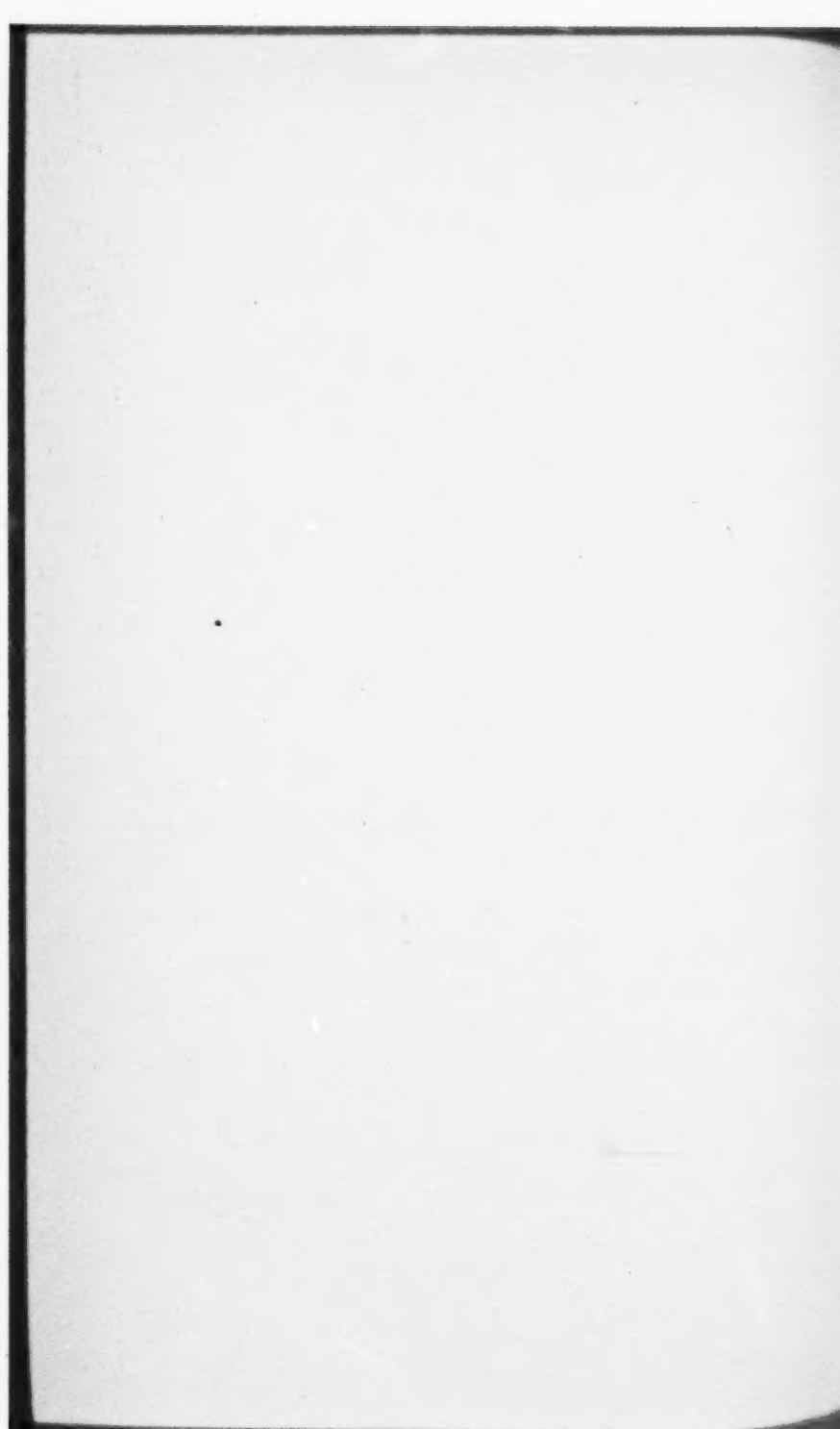
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**BRIEF OF ANDREW J. TALLAS, RESPONDENT, OPPOSING APPLICATION FOR WRIT OF CERTIORARI**

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DANIEL G. CASH,  
JOHN B. RICHARDS,  
Attorneys of Andrew J. Dallas,  
Duluth, Minnesota.







## I.

It is respectfully submitted on the part of respondent, Andrew J. Tallas, that the petition herein for writ of certiorari should be denied as contrary to the practice of this court; for the reason that there is not and never has been any lack of uniformity of decision either in the Federal Courts or in the State Courts upon the question involved in the dismissal of the complainant's bill in equity, as against the defendant, Andrew J. Tallas. For it is submitted that the principle so applied is as old as the English chancery practice; was imbedded in the Constitution of the United States in the Seventh Amendment thereto; was fixed in Section 723 Revised Statutes of the United States, and has been repeatedly applied by this court; so that it cannot be claimed that the question is one "open to controversy;" nor that it involves any new question of importance demanding the extraordinary jurisdiction of this writ.

The principle applied by the Circuit Court and by the Circuit Court of Appeals in harmony was that the complainant, out of possession of land, had a plain, speedy and adequate remedy at law by ejectment against Tallas who was in actual possession of the land claiming title when the suit was brought; and that "Equity Jurisdiction" over Tallas was barred; and the bill as against



him was dismissed on that sole ground; because it appeared that there had been numerous decisions of this court and of the Circuit Court of Appeals for the Eighth Circuit establishing lack of Federal Equity Jurisdiction in such cases. It is believed no authority to the contrary exists. The important right to jury trial is involved.

Hipp vs. Babin, 19 How. 271 (277) (1856).

United States vs. Wilson, 118 U. S., 86.

Whitehead vs. Shattuck, 138 U. S. 146 (151).

Sanders vs. Devereux, 60 Fed. Rep. 311 (C. C. A. 8th Circuit), (decided in 1894).

Jones vs. McKenzie, 122 Fed. Rep. 390 (C. C. A. 8th Circuit) (decided April 6th 1902).

Hall vs. Hobart, 186 Fed. Rep. 426 (108 C. C. A. 348), involving as here, riparian rights in a navigable stream as against the adverse claimant of an island. A very analogous case, holding that ejectment lies to protect such rights.)

See paragraph 3 of the opinion of the Circuit Court of Appeals in the pending case, Number 3787 of that Court, in 205 Fed. Rep. at page 13.

See also:

Galt vs. Galloway, 4 Peters, 332.

Lewis vs. Cocks, 23 Wall. 466 (90 U. S.) (1874.)



Killian vs. Ebbinghaus, 110 U. S. 568.  
Fussel vs. Gregg, 113 U. S. 550.  
Scott vs. Neely, 140 U. S. 106.  
Boston Co. vs. Montana Co. 188 U. S. 632,  
(634).  
Lawson vs. Mining Co., 207 U. S. 1, at  
page 9.  
Lacassagne vs. Chapuis, 144 U. S. 119.  
Thompson vs. Railway Co., 6 Wall. 134.

And decisions of other Federal Courts as follows:

Union Pacific Railway Co., vs. Cunn-  
ham, 173 Fed. 90.  
Gombert vs. Lyon, 80 Fed. 305.  
Gordon vs. Jackson, 72 Fed. 86.  
Giberson vs. Cook, 124 Fed. 986.  
Railroad Co., vs. Goodrich, 57 Fed. 879.  
Taylor vs. Clark, 98 Fed. 7, (8).  
Davidson vs. Calkins, 92 Fed. 231, (239).

No doubt it would be convenient for the plaintiff to settle the rights of Tallas along with those of Whiteside in one equitable suit, but an important constitutional right of Tallas is therein involved and jurisdiction as to him is denied to the Federal Court sitting in equity.

*Galt vs. Galloway*, 4 Peters,, 332, *supra*, is a case which well illustrates this point for in it the court drew a distinction as to those of the defendants who were in actual possession of the land involved, and those other



defendants who were not in possession of the land. Baker and Patterson made the point as follows:

“The remedy against them is at law and not in chancery; no decree could be made against them unless it should be that they should deliver possession of the premises and to obtain this, an action in ejectment is the appropriate remedy.” (page 337).

As to Baker and Patterson, the decree of the Circuit Court was affirmed; as to the other defendants who were not in possession of the land the decree of the Circuit Court was reversed.

So in this case the rule of convenience of practice as avoiding a multiplicity of suits yields to positive prohibitions of statute and constitution.

It is perfectly clear that the complainant's bill, *as to Tallas*, is merely an action in ejectment in the guise of a bill in chancery brought by plaintiff, not in possession of the land; that it involves only questions of legal title to land; and the rights of possession and use, accruing therefrom; and the complainant sought by his bill the right in terms stated as follows:

“And that the defendants be forever enjoined from interfering with and impeding the full enjoyment by this plaintiff \* \* \* \* \* including the full rights of access, *wharfage or other improvements which he* \* \* \* \* \* may see fit to make to reach out to the said \* \* \* \* \* navigated channel of the said waters.” (Prayer for relief, complaint, page 12 of record.)



That is to say, the plaintiff not in possession himself, was asking the court to put Tallas out of possession of the island; to quiet the title of the plaintiff in and to the said island; to give to the plaintiff the full and exclusive possession and right of exclusive enjoyment of it forever; claiming the right to wharf out over it, and to occupy it to its fullest extent, and to the exclusion of the world.

It is submitted to be clearly, as to Tallas, an "ejectment bill," pure and simple; where no controversy existed as to the title of the complainant in the Minnesota shore land; and, also, ownership by Whiteside of the Wisconsin shore land was conceded. The so-called "Tallas Island" lay between them in the zone of controversy; and Tallas was claiming title by his adverse possession.

The pending litigation arose solely because in 1902, the agents of the United States Government *dredged a new channel in the waters of the locus in quo*, in aid of public navigation.

In *Hipp vs. Babin*, 19 How. 271, *supra*, this court said:

"The bill in this cause is in substance and legal effect an ejectment bill. The title appears by the bill to be merely legal. The evidence to support it appears from documents accessible to either party and no particular circumstances are stated showing the necessity of the courts interfering either for preventing suits or other vexation or for preventing an injustice irremediable at law." (p. 277).



Such, it is submitted, is exactly the case here.

When the case was brought before the Circuit Court on the proofs taken before the examiner, Defendant Tallas, *at the threshold* moved to dismiss the bill on the grounds, to-wit:

That jurisdiction in equity was barred by Section 723 of the Revised Statutes of the United States; and by the Seventh Amendment to the Constitution of the United States. (See record at the top of page 40.)

Reliance was also placed by the defendant upon the following statute of the United States:

“Section 5. (Suits improperly in Circuit Court may be dismissed or remanded.) That if in any suit commenced in a Circuit Court, or removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of such Circuit Court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court or that the parties to said suit have been improperly or collusively made or joined either as plaintiff or defendant the said Circuit Court shall proceed no further therein but shall dismiss the suit, or remand it to the Court from which it was removed, as justice may require and shall make such order as to costs as shall be just.”

18 Statutes at Large, 472, Act of March 3.  
1875, Chapter 137, Section 5.



See the following decisions based thereon:

Stiegleder vs. McQuesten, 198 U. S., 141 and cases.

Hill vs. Walker, 167 Fed. 841 (C. C. A. for the 8th Circuit, Feb. 1st, 1901).

Taylor vs. Wier, 171 Fed. 636 (C. C. A. for the 3rd Circuit, May 17, 1909).

Yeandle vs. Pa. Railroad Co., 169 Fed. 938 (C. C. A. 3rd Circuit, April 12, 1909).

McGilvary vs. Ross, 164 Fed. 604 (C. C. A. 9th Circuit).

Koike vs. Atchison Railroad Co., 151 Fed. 623.

The proceedure taken by Tallas was that approved by this Court in *Stiegleder vs. McQuesten*, 198 U. S. 141, in the following language:

“The motion, based upon the proofs taken by the master to dismiss the cause was therefore an appropriate mode in which to raise the question of the jurisdiction of the Circuit Court.” (page 143).

The following cited decisions of this court establish that where adequate remedy at law exists there is total lack of jurisdiction *in equity* to proceed; that it is lack of jurisdiction of the *subject matter*; that consent can not confer it; that it can not be waived; and that it is the duty of the Court to raise the question, *sua sponte*,



though without objection by counsel, and against their desires:

Hipp vs. Babin, 19 How. 271.

Lewis vs. Cocks, 23 Wallace, 466, page 470.

Parker vs. Winnipesogee, 2 Black 545.

Killian vs. Ebbinghaus, 110 U. S. 568 (574).

Thompson vs. Railroad Co., 6 Wallace, 134.

United States vs. Wilson, 118 U. S. 86  
(page 88).

In the above cases the Supreme Court raised the point of its equity jurisdiction, *sua sponte*; and held that because there was a plain and adequate remedy at law, jurisdiction in equity was barred.

To bar the right of writ of certiorari in the pending case *as against Tallas*, it seems that the statement of this court in *Lewis vs. Cocks*, 23 Wallace, 466 is directly in point, and sufficient.

“Viewed in this light it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain, and adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. *This principle in the English equity jurisprudence is as old as the earliest period in its recorded history.*” (page 469.)



Again at page 470, the court said:

“In the present case, the bill seeks to enforce ‘a merely legal title.’ *An action of ejectment is an adequate remedy.*”

Thus the petitioner in this case is raising no novel point as to which any possible controversy could arise; and there is no conflict between the Circuit Court and the Circuit Court of Appeals; nor between different courts of appeal; nor dissenting opinion; and the principle acted upon by both of the lower courts in harmony is stated by this court to be “a principle in the English equity jurisprudence as old as the earliest period in its recorded history;” imbedded in Section 723 Revised Statutes of the United States and in the Seventh Amendment to the Constitution of the United States.

The petition for the writ shows no probability of error in the decrees of the two lower courts; and on the contrary it is perfectly apparent that their action refusing jurisdiction as to Tallas was correct and in conformity with old and settled principles of jurisprudence.

Wherefore, it is respectfully submitted that the petition should be denied as against the respondent, Andrew J. Tallas. (Case No. 3787 in Circuit Court of Appeals).



## II.

It seems to be settled by the decisions of this court that the writ of certiorari will not issue unless it is shown that there is no right of review by appeal from the decision of the Circuit Court of Appeals.

Re Tampa Suburban Railroad Co., 168 U. S., 563.

United States vs. Dickenson, 213 U. S. 92.

The petitioner for the writ here does not concede that he has no right of appeal from the decree of the Circuit Court of Appeals; but, on the contrary, is claiming such right of review by appeal and shows that he has appealed. It is submitted that until the petitioner satisfies this court that no appeal lies from the decision of the Circuit Court of Appeals, he is not in position to ask for the granting of the writ of certiorari as here prayed for.

February 26th, A. D. 1914.

Respectfully submitted,

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Duluth, Minn.







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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

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GEORGE W. NORTON, as Executor and Trustee of  
the Estate of GEORGE W. NORTON, Deceased,  
Appellant.

against

ROBERT B. WHITESIDE and  
ANDREW J. TALLAS,  
Appellees.

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No. 339.

Appeal from the United States Circuit Court of Appeals for  
the Eighth Circuit.

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## STATEMENT OF FACTS.

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(1) The appellant owns land on the north shore of St. Louis Bay in the State of Minnesota. The appellee Whiteside owns lands known as Big Island on the south shore of said bay in the State of Wisconsin and opposite the lands of appellant. The lands are described in the bill of complaint. Alexander, named as a defendant, owns a small parcel of Big Island not materially involved and early in the proceedings it was stipulated that the determination as to Whiteside should be binding upon him, since which time he has taken no active part in the proceedings. St. Louis Bay comprises the head waters of Lake Superior and into it flows the St. Louis River on two



sides of Big Island, although the easterly channel may be said to flow into Pokegama Bay which opens into St. Louis Bay.

St. Louis Bay at the place in question varies from 2000 to 3000 feet in width. It becomes wider further down and through a narrow strait opens into a broad bay known as the Bay of Duluth or Superior Bay which, through what is known as the Natural Entry and also through an artificial canal connects with Lake Superior. Lake Superior at the western extremity is broken up into numerous bays and indentures, the main ones however being St. Louis Bay and Superior Bay.

The lands of Norton are in Sections 23 and 24, Township 49, Range 15. The lands of Whiteside are in Township 49, Range 14, and Township 49, Range 15. Let reference be had to Exhibits 3, 4, and 12, copies of which are furnished the Court and fractional copies thereof attached to this brief.

(2) Township 49-14 was surveyed by the United States in 1854 and the plat approved July 17th of that year and Township 49-15 was surveyed and platted in 1857 and approved that year. Lands described as belonging to Norton were patented by the United States in 1860 and Norton derives title thereunder. A part of Whiteside's lands were entered in 1859 and patented in 1860. A part were entered in 1867 and patented in 1868. Others passed under the grant of Congress to the State of Wisconsin in 1850 and after the adjustment of controversies which had arisen were subsequently patented.

(3) The St. Louis River rises in the forests north of Duluth, is fed by numerous streams and lakes, takes a big curve or swing to the west and south and finally on an easterly course drops into the Lake Superior Basin at the first falls above the Indian village now known as Fond du Lac, which is within the corporate limits of Duluth. The stream is a rapid one with many sharp descents until the above point is reached.



(4) All of the lands owned by the above parties were part of the N. W. Territory organized under the ordinance of 1787, under which ordinance and the subsequent acts of Congress passed prior to disposition of any lands here involved it was provided that navigable waters emptying into the Mississippi and St. Lawrence Rivers should forever be and remain public highways, free forever to the inhabitants of said Territory and the citizens of the United States and those of other states that might be admitted, and it was considered by the Circuit Court that the federal government retained over said navigable waters and over the regulation of commerce thereon paramount control, including the power to improve the same in the aid of navigation and commerce, and that, amongst others, the State of Wisconsin and a part of the State of Minnesota were formed out of said territory.

(5) In the Enabling Act of Congress for the formation of a state government in Wisconsin Territory, approved August 6, 1846, the northerly and westerly boundary of the State of Wisconsin was described in part as follows:

"Thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same above the Indian Village, according to Nicoilet's map; thence due south to the main branch of the St. Croix River."

In the enabling act passed by Congress to authorize the people of the Territory of Minnesota to form a constitution and state government, approved February 26th, 1857, the southerly, easterly and northeasterly boundaries of said future state were described as follows:

"Thence east, along the northerly boundary of the State of Iowa to the main channel of the Mississippi River; thence up the main channel of said river, and



following the boundary line of the State of Wisconsin, until the same intersects the St. Louis River; thence down said river, to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British possession."

These were the descriptions of the boundaries embraced in the constitutions under which the said states were formally admitted to the Union.

(6) The Circuit Court held as follows (see 8th paragraph of the decree, page 130 of Transcript.)

"It is considered by the Court that the Saint Louis River is substantially correctly described in the bill of complaint down to the first falls above Fond du Lac, or the Indian Village. But it is not considered by the court necessary in this case to determine where the river ends and the lake begins; nor whether the waters at the locus in quo are more properly designated as waters of the lake or of the river, for, in the view of the Court, the result in the case must be the same whether these waters are river waters or waters of an arm of Lake Superior. Whatever the character of these waters, the boundary line between Wisconsin and Minnesota would in the opinion of the court, and it is so found, follow the main navigable channel between Big Island and the Minnesota shore, that is, between the shore line of plaintiff on the one side and the shore line of defendants Whiteside and Alexander on the other."

(7) The Circuit Court of Appeals speaking through District Judge Van Valkenburgh, considered that the waters at the locus in quo were part of St. Louis River, and argued that the natural entry between Minnesota and Wisconsin points is the most logical place to be designated as the mouth of the river, but that in any event the mouth ought not to be considered as below the narrows at Grassy



Point, and assigned as one of its reasons therefor that the trial court so held. (See pp. 151-152 Transcript and maps prefixed to this brief).

(8) The waters from the main body of Lake Superior up to the first falls above the Indian Village, which is substantially synonymous with the old town of Fond du Lac, now within the corporate limits of the City of Duluth, are and ever have been navigable, and boats and vessels navigating the Great Lakes have from the earliest times navigated such waters that far.

The lands of Whiteside constitute a large island known as "The Island," "Big Island," "Clough's Island," and now as "Whiteside's Island." It was, at the time of surveying and platting of said township, treated as in Wisconsin and the boundary line between Minnesota and Wisconsin has ever since been acquiesced in as running through the waters between Big Island and the northerly shore of said waters. There is reason why such conclusion should not have been reached, but acquiescence has, we believe, made it good. The lands of appellant therefore abut upon the northerly and those of the appellee upon the southerly side of this body of water.

(9) The said waters at the locus in quo were designated upon the government plats of the survey of said township as St. Louis Bay, and were claimed by said Norton to be part of the waters of Lake Superior, and by the defendants to be an expansion of the St. Louis River. The said waters at the point in question between Big Island, owned by the respondent Whiteside, and the lands of the plaintiff on the northerly shore were about 2,000 feet wide, and the course of the main navigable natural channel through the same was sinuous, in some places being nearer one shore than the other, or vice versa.

The evidence we claim, but will not here discuss, shows these waters to be those of Lake Superior.



(10) Subsequent to the survey of the public lands upon both sides of said waters and the disposition thereof by the government as aforesaid, there gradually became formed a low, marshy, irregular shaped island in the waters between the lands now owned by the said Norton and those of the said Whiteside, which has at times been entirely covered with water and has changed in contour, extent and form. The same has never been surveyed, platted or disposed of as public land, and the Circuit Court held that the same vested, like other parts of the bed of said waters, and was held in trust by the same character of title and for the same purpose as the residue of the bed or subaqueous land, and that no person could acquire private ownership thereof or control over the same in any manner, except such as inheres in the owners of the shore lands abutting upon said waters as riparian rights and privileges, and that subject to the public rights and paramount control of the government such riparian owners as may be entitled thereto have the exclusive right and control and use of the same.

(11) Under the act of Congress of September 19, 1890, the War Department established dock lines on the Minnesota and Wisconsin sides, which were approved December 5, 1894. Such dock line upon the Minnesota side in front of the lands of the plaintiff hereinbefore described, extended through said low, marshy island, and the dock line on the Wisconsin side in front of the lands of said Whiteside was some distance to the southward of said low, marshy island.

(12) Under the acts of Congress of June 13, 1892, June 3, 1896, and March 3, 1899, the War Department made a survey and examination of said waters, reestablished dock lines upon both sides, the same being at some points nearer and at some points farther from the respective shores than the dock lines previously established, and the same were established with a view to the immediate improvement of the deep water channel through said waters in the aid of



navigation and commerce. The dock line in front of petitioner's premises is substantially identical with the one previously established, but on the Wisconsin side in front of said Whiteside's premises it is at some points nearer thereto than the previous dock line, but at all points is southerly from the so-called marshy island hereinbefore described and from the improved channel in said waters hereinafter referred to.

(13) The map and survey of the harbor and dock lines were approved by the Secretary of War November 17, 1899, and the dock and harbor lines upon the Minnesota side in the said waters in front of the lands of petitioner extended through the said low, marshy island, and likewise the channel which the government improved passed through said island.

(14) The War Department improved said channel within said harbor lines in accordance with the survey and map, and improved, deepened and straightened the navigable channel through said waters between said harbor lines, the said improved channel crossing and re-crossing the original course of deepest water, but running generally in the same direction and practically midway between shores, and operating in the aid of navigation and commerce to deepen and straighten the navigable and navigated channel in said waters between the shores thereof, and make the same more practicable, and in the making of said improvement the War Department cut through the said low, marshy island, leaving a small part thereof between the harbor or dock line on the Minnesota side and the shore, and a small parcel between said deep water channel and the established harbor line on the Wisconsin side in front of said Whiteside's lands, and this latter parcel afterwards disappeared and no longer exists. The government channel so dredged was about midway between the shore lands of the petitioner and the shore lands of the defendant Whiteside.



(15) In the improvement of said channel the government dredged out a considerable amount of material and deposited the same upon said portion of said low, marshy island on the northerly side of the channel, and in extension of said portion of said island, and by reason thereof there is now much more land appearing above the water than appeared formerly before said improvement was made, the same operating to build a reef of land extending above the water lying between said improved navigable and navigated channel and the original Minnesota main shore. The original deep water channel through the waters in front of petitioner's land has been entirely closed at a point opposite the said lands by reason of the depositing of said dredging material and the formation of said reef of land and no longer exists as a continuous channel, and is no longer a part of the navigable and navigated channels of the waters in front of said petitioner's lands, having been abandoned as such by the government, and it is apparent that the same will gradually become more and more shallow by the natural action of the waters, thus depriving petitioner of access to the improved navigable and navigated channels of said waters in front of his premises save by extending out over the shallow water and across said portion of said unsurveyed island remaining, and the said land made by the government dredging.

(16) One of the principal elements of value to the petitioner's land is the right of access, by wharfage or other improvement, to the navigable waters in front thereof.

(17) The said Whiteside and his associate Alexander have access to navigable water from in front of their said lands southerly of said navigable channel free from any impediment whatever.

(18) All of the original defendants claim that the boundary between Wisconsin and Minnesota extended through the water between this low, marshy, unsurveyed



island and the main land on the Minnesota side, because at that particular place the said sinuous course of deepest water at one time lay between said island and said shore, although there is no proof as to where the course of deepest water was at the time of the admission of these states into the Union, and none available.

(19) Said improvement by the government was made from the years 1899 to 1902, inclusive.

(20) The appellee Tallas had a small cabin upon a portion of said newly formed, marshy island when said work was begun, which cabin was thereafter burned, it having stood on posts near the northerly point or shore thereof. He thereafter constructed another cabin, existing thereon at the time of the decree, some distance farther in upon the marshy island, and at the time of the commencement and trial of the action was in possession of such portion of such island as was occupied by him, claiming to own the same by virtue of continued possession thereof.

(21) The appellee Whiteside claimed that because of his ownership of Big Island his original riparian rights extended to the line of deepest water between his lands and the plaintiff's, and that notwithstanding the government had dredged out and straightened the navigable channel, midway between the shores, he still had the right to claim and occupy clear across the channel so improved and straightened by the government, and thus to claim and have rights of occupancy on both sides of the navigable channel so straightened and dredged, and entirely cut off any access of the petitioner thereto, notwithstanding before such straightening he had the right to own and occupy the riparian property only on one side of the navigable and navigated channel. This claim is based on the ground that this is a river and that he owns to the thread of deepest water, which at this point was further north than the actual and improved middle. The appellant maintained that such



claims on their part worked a cloud upon his title to his lands abutting upon said waters, and the rights and privileges and riparian rights incident thereto, and if persisted in would deprive the appellant of one of the chief benefits and enjoyments of his said land, and one of the chief elements of the value thereof, and the suit in question was brought to adjudicate the rights of the parties, and to have it adjudged that the plaintiff Norton's riparian rights and privileges extended to the improved navigable and navigated deep water course.

(22) The Circuit Court held that the claims of Whiteside and Alexander were unfounded, and that their rights did not extend beyond the said navigable and navigated channel as improved and straightened by the government, and that they had no right to interpose any obstruction to the appellant's enjoyment of his said lands on the Minnesota shore, and of the riparian rights and privileges incident thereto, including his right of access, to reach out to the said improved navigable channel between said dock lines, and over and across the made land resulting from the deposit of said dredging material, and that his rights were not abridged so as to prevent such access and exclusive right and enjoyment by reason of any interstate boundary in the bed of said waters, and held that the interstate boundary was not an inflexible one, but the same follows through the improved channel made by the federal government by authority of Congress between said banks and shores and between said dock lines in the improvement of said navigable channel in the aid of commerce and navigation. The Circuit Court considered that there was no reason to hold that the state line exists elsewhere than in the middle of these waters and through the improved channel and every reason that it should be held to be there.

(23) The rights of appellant by reason of the ownership of the shore were held by the Circuit Court to extend out to the improved and straightened channel, subject to



the paramount right of the government and the public between the dock line and the original shore line, but free, clear and discharged of any claim on the part of the defendants Whiteside and Alexander.

(24) It was further held by the Circuit Court that, said Tallas being in physical possession of such portion of said unsurveyed marshy island as he was in possession of, the court had not jurisdiction in the said action in equity to determine his rights, but that resort must be had to an action at law to determine the same, and the Circuit Court therefore dismissed the said action or suit as to said Tallas without prejudice to the petitioner to have recourse to a court of law to determine the same. The judgment and decree of the Circuit Court was rendered and entered by the Circuit Court on June 14th, 1911.

From the decision of the Circuit Court the Appellee Whiteside appealed to the Circuit Court of Appeals, for the Eighth Circuit, and the Appellant appealed from the said decision in so far as it dismissed his bill against said Tallas.

On March 24th, 1913, the Circuit Court of Appeals of the Eighth Circuit reversed the decree of the lower court, with directions that as to Whiteside the bill be dismissed, and affirmed the decree of the lower court dismissing the bill as to said Tallas. The decision is reported in 205 Federal, page 5.

Appeal to the Supreme Court of United States was allowed December 17th, 1913, by United States Circuit Judge William C. Hook and the same is now presented for argument.

#### **ASSIGNMENT OF ERRORS.**

The judgments and decrees of the Circuit Court of Appeals appealed from are erroneous, to-wit:

As to the appellee Whiteside the court erred as follows:

First. In reversing the judgment and decree of the United States District (formerly Circuit) Court for the



District of Minnesota, which decree of the lower court held that the appellant George W. Norton, as Executor and Trustee of the estate of George W. Norton, deceased, had the right of property in question as against Robert B. Whiteside.

Second. In entering judgment and decree ordering said case remanded to the United States District Court, with directions to enter a decree dismissing the bill of complaint herein as to defendant Whiteside.

Third. In holding that the enabling acts of Congress fixing the boundary line between the States of Wisconsin and Minnesota through Lake Superior and through the main channel of the St. Louis River thereby so established the boundary line between the said states through said waters that the dredging, improving and straightening of said channel between the banks or shores by the Government in aid of navigation through the middle of the Bay and River St. Louis left a portion of the State of Wisconsin lying north of the improved, permanent main channel, and thereby upon both sides of the navigable waters thereof.

Fourth. In holding that the waters between the land of appellant Norton and appellee Whiteside are not an arm or bay of Lake Superior but are waters of St. Louis River.

Fifth. In holding that the small, low, marshy island (upon which Tallas squatted) formed after the patenting and conveying of the shore lands and long after the fixing of the constitutional boundaries of Wisconsin and Minnesota became attached to the lands owned by appellee Whiteside in Wisconsin and in not holding that the same belonged to the states in sovereign ownership the same as the rest of the bed of these waters, and in not holding that the raising of the bed in the form of such island above the surface of the water was without any controlling effect in this controversy.

Sixth. The court erred in holding that because the said channel was improved by the Government in aid of



navigation after instead of before the formation of said little island that therefore so much of said island as was left north of the said improved channel attached to lands on the southerly side of such channel, thereby holding that the owner of lands on the southerly side of said main channel as improved became possessed of riparian rights and property on both sides of said channel to the extinction of all riparian rights of the owner of lands upon the northerly shore.

Seventh. In holding that because the thread of deepest water within the two shores or banks through this bay or channel of the river, whichever it is called, in its sinuous course may have been at one time prior to said improvement to the one side or the other of the actual middle of said waters, that the same thereby became irrevocably fixed as the interstate boundary and that the boundary does not follow the course of the deepest navigable and navigated channel as improved by the Government in aid of navigation—substantially midway between the banks.

Eighth. In holding that by reason of the dredging and straightening of the channel within the banks by the Government in aid of navigation the appellant was thereby deprived of his riparian rights, and the rights to reach the main channel and navigable waters for the purposes of navigation.

Ninth. The court erred in not holding and deciding that the appellant Norton possessed as incidental to his shore ownership of the Minnesota lands the right to reach out to the navigable waters of said improved deep water channel, directly in front of his premises, with the right to construct docks and to improve, reclaim and occupy out to the established dock line, unimpeded by the portion of said island remaining upon the north side of said channel and unimpeded by the location of the earlier sinuous thread of deepest water.

Tenth. The court erred in treating this cause as an



action to try the title to real estate subject as such to private ownership and erred in refusing to enter judgment and decree in favor of the appellant Norton against the appellee Whiteside as demanded in the bill of complaint herein.

The court further erred in its holding between appellant Norton and appellee Andrew J. Tallas as follows:

Eleventh. In affirming the judgment and decree of the United States Circuit Court for the District of Minnesota dismissing the bill of complaint as to said Andrew J. Tallas.

Twelfth. In holding and decreeing that it and the lower court had no jurisdiction in this action in equity to determine the rights of said defendant Tallas, but that resort must be had to an action at law to determine the same.

Thirteenth. In failing to render a decree in favor of appellant Norton against appellee Tallas for the relief prayed for in the bill of complaint herein, and in failing to hold the court had jurisdiction of the parties and the subject matter of the action, and therefore full power and authority to determine said cause as to all parties thereto.

Fourteenth. In failing to hold that the defendant Tallas having answered to the merits of said cause and having participated in the taking of testimony therein, without raising any question as to the jurisdiction of the court as to him until after the report of the special master and the making up of the record and until the argument thereon, that the said defendant Tallas waived any right to object to the jurisdiction of a court of equity to determine said cause as to him.

#### **ARGUMENT.**

Upon the state of facts set forth and because of the errors alleged, we ask this court to determine the questions herein arising under the constitution and laws of the United



States upon a broad and equitable basis which gives full effect to the constitutional boundaries; to the purpose of taking navigable waters therefor; full effect to the Ordinance of 1787; to the power over navigable waterways retained by the government; and which will give to each state and the citizens thereof access to the permanent navigable portions of the boundary waters; give riparian owners in each state full access thereto and place it beyond the power of an owner upon one side to deprive the owner upon the opposite side of such enjoyment and which will make a multitude of controversies between the states and perpetual conflict between the police and taxing authorities thereof impossible. This we think the court of equity has power to do. This consideration we think the court of appeals did not give the case and did not therefore arrive at a conclusion in accordance with equity as between the parties nor in accordance with the public interests involved. The case is too far reaching to be determined without a consideration of all these matters and principles which we believe controlling.

The center of Lake Superior and the center of St. Louis River were taken as the interstate boundary. This bay or these bays which under different names extend far inland are the upper waters of the lake. We hold them to be a part of the lake. The river flows into these bays or into the upper one. The Counsel for appellee contend that the river flows into the lake between Minnesota and Wisconsin Points and that these bays should be held to be a part of the river. The Court of Appeals moved the river down part way into the upper bay.

In any event the waters are navigable and the constitutional interstate boundary goes through the same.

Counsel for appellee think they can claim some greater rights if at the *locus in quo* the waters can be termed a river. We shall try to show the contrary and shall also claim that there is no sufficient basis for claiming this body



of water at the place in question to be a river or to be other than head waters of the Lake. This latter question may however be deferred until after the consideration of the matters of greater and controlling importance.

# I.

**The Purpose of Making Navigable Streams and Channels or Bodies of Water Interstate Boundaries is to Give Each State and the Citizens Thereof Full Access to the Navigable Waters or Channels so That They Cannot be Cut Off Therefrom.**

**This Purpose is Not Defeated Nor the Benefits Thereof Lost by the Improvement of the Main Channel by the Government.**

Iowa v. Illinois, 147 U. S. 1; Book 37 L. Ed. 55.

Buttenueth v. Bridge Co., 123 Ill., 535.

Handly's Lessees v. Anthony, 18 U. S. (Wheat) 374; Book 5 L. Ed. 113.

Franzini v. Layland, 120 Wis., 72; 97 N. W. Rep. 499.

Indiana v. Kentucky, 136 U. S. 1; Book 34 L. Ed. 329.

Missouri v. Kentucky, 78 U. S., 11; Book 20 L. Ed. 116.

In the case of *Iowa v. Illinois*, the court said:

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is therefore laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states, up to which each state will on its side exercise jurisdiction."



The court remarks at length and says:

"It is the free navigation of the river—when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called 'nature's pathway,'—that states demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or states, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either state intended to surrender to the state or nation occupying the opposite shore the whole of the principal channel or highway for vessels and thus debar its own vessels the right of passing to and fro for purposes of defense or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purposes of commerce or other purposes deemed of great value to independent states or nations."

This case clearly states why navigable streams are so often made boundaries between jurisdictions and sustains the indestructible right of each jurisdiction to enjoy the facilities of navigation and to extend out to the center of the main channel of commerce.

In *Gibson vs. United States*, 166 U. S. 269, Chief Justice Fuller said:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution."

In *Scranton v. Wheeler*, 179 U. S. 14, Mr. Justice Harlan, in speaking of this power of the Federal Government, after a review of many cases, said:

"All the cases concur in holding that the power of Congress to regulate commerce, and therefore naviga-



tion, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the government does not transcend the limits established by the supreme law of the land."

Then speaking of the rule in Michigan, that the title of the riparian owners extends to the middle line of the stream, the court said:

"But it is equally well settled in that state that the rights of the riparian owner are subject to the public easement or servitude of navigation." (Citing cases.) "So that, whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

In almost any of these cases there is evident the recognized supreme and paramount power of the general gov-



ernment over navigation and commerce including the unrestricted power of improvement of the navigable waters in aid thereof. The doctrine is that this power was reserved to the Government at the time of the admission of these states and that the states and all the citizens thereof must take cognizance thereof.

The Government then concluded to improve the highway through this navigable body of water through which the interstate boundary passes. A careful method was followed in order that the work should be properly done and the purpose of its making subserved. Surveys and maps were made and reports submitted. The dock lines upon either side of the center were established and designated on the surveys and maps. The work proposed was shown to be the improvement of the navigable channel through the middle of these waters by deepening, widening and straightening the same. The same general course between the banks and substantially midway thereof was maintained. The surveys, maps and plans having been approved by the Secretary of War, Congress appropriated the money to carry out the work. The work was done from 1899-1902. The result was that a tortuous narrow thread has become a great practical shipway—a permanent highway.

In *Handly's Lessees v. Anthony, Supra*, it was held that the boundary of the State of Kentucky extends only to low water mark on the western or northwestern side of the Ohio River, and the court said:

“When a great river is the boundary between two nations or states, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream; but when, as in this case, one state is the original proprietor and grants the territory on one side only, it retains the river within its own domain and the newly created state extends to the river only. *The river, however, is its boundary.*”  
The court quotes from Vattel the statement:



"Nothing is more natural than to take a river for a boundary when a state is established on its borders."

This case emphasizes the fact that it is the *river* that is the boundary and in which boundary waters, unless otherwise limited, the respective states and their citizens enjoy the rights and privileges that are appurtenant thereto. The court further said:

"Wherever the river is a boundary between states it is the main, the permanent river which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark."

If then "the preservation by each (state) of its equal right in the navigation of the stream is the subject of paramount interest"—and in order to protect and maintain navigation and commerce the government in the exercise of its full power to do so improves the center of that channel, why must it not follow as the night the day *that it is through that improved channel that the unseen boundary runs*. It serves every interest, is in accord with the description of the constitutional boundary, preserves the rights of individuals and the public and allows no individual to defeat the provisions of the Ordinance of 1787 nor to nullify the subsequent laws of Congress nor to render nugatory the very purpose of the selection of these waters as the place for the constitutional boundary. The trial court so viewed it. So strongly did it do so that without determining the other questions it held the complainant (appellant here) entitled to the equitable relief prayed for. However as, if its decision were right for any other reason, it should have been affirmed, we do not relinquish other contentions urged both in the Circuit (now District) Court and in the Circuit Court of Appeals in support of the equity of the bill.

We are unable to agree that the improvement of this channel of water, which the government always had power



to do, by making a better channel through the middle of it is in any sense akin to an avulsion. The learned District Judge who wrote the opinion for the Circuit Court of Appeals seems to have considered it so, and even though he thought that our contentions for the preservation of the rights which this court has declared were controlling in the selection of such boundaries were in conflict with reason and authority, it is nevertheless only with profound respect that we here suggest that he erred.

The Supreme Court of Wisconsin in the case of *Franzini vs. Layland, Supra*, in declaring that the boundary must be maintained at midway the deep water pathway, said:

*"It is not referable necessarily to the condition of the channel at the time the state was admitted into the Union. It is a shifting line, subject, however, to property rights, the idea embodied in the enabling act permitting Wisconsin to come into the Union, as a state, being that there shall be for all time preserved within its boundary one-half of the main navigable channel of the river."*

We do not think that principle is abrogated by the improvement and betterment of that same channel by the Government in pursuance of its lawful power always reserved to it. The idea that a new channel has been created, an artificial channel, or stream or strait made should be dismissed. This improvement is in and of this main channel of the St. Louis River between Big Island and the Minnesota shore, if it is a river, and in the middle of it. It is through the middle of St. Louis Bay, if it is a bay, or arm of the Lake. The trial court said it was so and that appellant is entitled to access thereto. The Circuit Court of Appeals held that we were not so entitled because it was there held that a private ownership of the bed intervened. We allege such conclusion to be error. If our contention be not true then the main purpose sought to be subserved by the adoption of such waters as interstate boundaries has



been defeated by the exercise of that very power which was retained in the Federal Government to improve the same and make the same more effective.

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## II.

**Upon the Admission Into the Union of States Carved Out of the Northwest Territory, the Title to the Beds of the Navigable Streams and Lakes Vested in the States, to the Boundary Lines Thereof, Which Title is Not a Proprietary One, But a Sovereign Title Held by the States in an Inalienable Trust for the Benefit of the Public, and Until the Formation of Such States and Their Admission Into the Union, Such Title Was Held by the Federal Government in Trust for the Future States.**

St. P. & P. Ry. Co. v. Schurmeier, 7 Wall, 272  
(74 U. S.) Book 19 L. Ed. 74.

Illinois Cent. Ry. Co. v. Illinois, 146 U. S. 387;  
Book 36 L. Ed. 1018.

Knight v. United Land Assn. 142 U. S. 161;  
Book 35 L. Ed. 974.

Pollard v. Hagan, 3 How., 212, Book 11 L. Ed.  
565.

Martin v. Waddell, 41 U. S. 367; Book 10 L.  
Ed. 997.

Packer v. Bird, 137 U. S. 661; Book 34 L. Ed.  
819.

Rossmiller v. State, 114 Wis., 169; 89 N. W.  
Rep. 839.

Barney v. Keokuk, 94 U. S. 324; Book 24 L.  
Ed. 224.

McLennan v. Prentice, 85 Wis., 427.

Hicks Att. Gen. ex rel Askew v. Smith, 109  
Wis. 532; 85 N. W. Rep. 512.

Hanford v. St. P. & D. Ry. Co., 43 Minn., 104.

Lamprey v. State, 52 Minn., 181.



Bradshaw v. Duluth Imperial Mill Co., 52 Minn., 59.

Leverich v. Mobile, 110 Fed. 170.

State v. Venice of America Land Co., 160 Mich., 680; 125 N. W., 770.

Broward v. Mabry, 50 So. Rep. (Fla.) 826.

In the case of *Railway Co. v. Schurmeier, Supra*, the court refers to the views of Chancellor Kent wherein that distinguished commentator promulgates the doctrine that grants of lands bounded on rivers, above the tide water, carry the exclusive right and title of the grantee to the center of the stream, unless there is an express reservation in the grant; and that the public have, in cases where the river is navigable, an easement or right of passage, and the court says that decided cases of the highest authority confirm that doctrine and that it is doubtless correct in most or all jurisdictions where the rules of the common law prevail as understood in the parent country; that such rules generally have been adopted in this country as applied to rivers not navigable, when named in a grant or deed as a boundary to land, and that substantially the same rules are adopted by Congress as applied to streams not navigable, but that many acts of Congress, some of which are referred to in the opinion, have provided that all navigable rivers or streams in the territory of the United States should be deemed to be and remain public highways. The court further says:

"Irrespective of the acts of Congress, it should be remarked that navigable waters, not affected by the ebb and flow of the tide, such as the Great Lakes and the Mississippi River, were unknown to courts and jurists when the rules of the common law were ordained; and even when the learned commentaries were written, to which reference is made, it was still the settled doctrine of this court that the admiralty had no jurisdiction except where the tide ebbed and flowed."



The court refers to the case of *The Jefferson*, 10 Wheat, 428, and *The Genesee Chief*, 12 How. 456, and others. The court then said:

"Extended discussion of that topic, however, is unnecessary as the court decides to place the decision in this case upon the several acts of Congress making provision for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys. Such a reservation in the acts of Congress, providing for the survey and sale of such lands, must have the same effect as it would be entitled to receive if it were incorporated into the patent, especially as there is nothing in the field notes, nor in the official plat or patent, inconsistent with that explicit reservation. Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words 'navigable' and 'not navigable' in that sense as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide waters and in which there were no salt water streams. Viewed in the light of these considerations, the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways."

This case limited the private grants bordering on a stream to the stream's edge, and left the title to the bed of such stream to fall to the state, as declared more fully in other cases.

The case of *Illinois Cent. Ry. Co. v. Illinois*, *Supra*, covers many questions but on the question involved in the above proposition, the court says:



"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. \* \* \*

The same doctrine is in this country held to be applicable to lands covered by fresh water and the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters and in the absence of the ebb and flow of the tide."

The case then goes on to break down the distinction between waters in which the tide ebbs and flows and in which it does not, and to wipe out that test as a criterion for determining whether the ownership of the beds of waters shall be in the public or in the shore owner, and holds that in view of our Great Lakes and great rivers, navigable for hundreds of miles, if such a distinction is made on account of the tide, it is arbitrary, without any foundation in reason and inconsistent with reason. The court shows clearly why and how the doctrine of public and private waters, based on the ebb and flow of the tide, or the absence thereof, grew up in England, where the physical conditions were widely different, the rivers being small and inconsequential, emptying into the arms of the sea wherein the tide did ebb and flow, and the court holds that the same doctrine as to dominion and sovereignty over and ownership of lands under the navigable waters and the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under the tide waters on the borders of the sea, and that the lands are



held by the same right in the one class as in the other and subject to the same trusts and limitations.

On pages 1042 and 1043 in the Lawyers' Edition Volume, the court said that the title which the state holds to the land under the waters of the Great Lakes is different in character from that which the state holds in lands intended for sale; that it is different in character from the title which the United States holds in the public lands which are open to pre-emption and sale; that it is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein, freed from the obstruction or interference of private parties. The court goes on to speak of the purposes for which parties may be allowed to use the lands under the waters, as for instance, wharfing out, etc., in aid of or for convenience in navigation, and of the abdication on the part of the state to private parties of such rights and privileges, but contrasts this with the doctrine of abdication on the part of the states of the general control over the lands under the navigable waters, such allowance being not inconsistent with the exercise of that trust which requires the government of the state to preserve such waters to the public use, which trust cannot be relinquished by a transfer of the property. The court further says:

"The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

The court then, speaking of the fact that sometimes language used by the court in opinions is given too broad an interpretation, because it should be considered only as related to the particular facts, says:



"A grant of all of the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of water \* \* \* than it can abdicate its police powers in the administration of government and the preservation of the peace."

In *Knight v. United Land Ass'n., Supra*, on page 982 of the L. Ed. Volume, and on page 183 of the original volume, the court said:

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original states possess within their respective borders."

In *Packer v. Bird, Supra*, the contention was over an island in the Sacramento River assumed to be navigable at that point. Mr. Justice Field in the decision said that it is undoubtedly the rule of common law that the title of owners of lands bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of the owners is limited to high water mark and that the title in such case, in this country, below that mark, is vested in the state; that private ownership of the soils under them is deemed inconsistent with the interest of the public at large in their uses for the purposes of commerce; that those rivers in this country are regarded as public, navigable rivers in law, which are navigable in fact, and as such,



in the case of *Daniel Ball*, 10 Wall 557-563, they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel for commerce are conducted in the customary modes of trade and travel on water; that the same reasons exist therefor in this country for the exclusion of the right of private ownership over the soil under navigable waters, when they are susceptible of being used as highways for commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. The court refers to the early cases arising on the Atlantic Coast in this country and to their following naturally the English common law, and refers to the cases in the West where there is more conflict in the states, many of which have departed from the common law, in so far as the same makes the ebb and flow of the tide the criterion for the determination of navigability.

The court then refers to the case of *The Genesee Chief*, 12 How, 443, and *Barney v. Keokuk*, 94 U. S., 324, and says:

"The legislation of Congress for the survey of the public lands recognizes the general rule as to the public interest in waters of navigable streams without reference to the existence or absence of the tide in them. As early as 1796, in an Act providing for the sale of such lands in the territory northwest of the River Ohio and above the mouth of Kentucky River, Congress declared 'that all navigable rivers within the territory to be disposed of by virtue of the Act shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both.' "

The case declares that the courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants, leaving it to be determined by the states



what incidents or rights attach to the ownership of property conveyed by the government, subject to the condition that their rules do not impair the efficiency of the grants or contravene the public rights in the waters.

*With the criterion of the tide out of the way then, under such authorities as this, the actual title of the grantee of the shore lands would end at the shore, and the bed vest in the state, in trust for the public at large.*

In *Rossmiller v. State, Supra*, the questions involved related to the title to the beds of navigable lakes within the state of Wisconsin. The question arose over the shipping of ice outside of the state, contrary to certain statutes of that state, without license from the state. Mr. Justice Marshall, expressing the unanimous decision of the court in his opinion, held that no property right was acquired by the state by the mere legislative declaration that ice formed upon meandered lakes within the boundaries of the state belongs to the state as property; that under our constitutional system the legislature has no such power as that of changing the ownership of property by its mere fiat. He said:

"It has not been supposed that the state could deal with public waters, or with any other thing held upon a like trust to that of such waters, as the proprietor thereof,—that any such thing could be treated in any respect as the absolute property of the state, and used for purposes of revenue."

It was further said that after the most painstaking investigation the court could give, with a view of possibly sustaining the act in question, it was unable to discover anything in reason or authority to support the idea of state ownership of ice formed on public waters. The court on page 843 of the opinion as reported in the 89 N. W. Rep., said:



"We are safe in saying that no court has more definitely declared that the interest of the state in its navigable waters and the lands under them, and all the incidents thereof, are purely of a trust character, the beneficiaries, on the plane of perfect equality, being the whole people of the state, than this court has done in recent years. In doing that, it is believed, the people have been rescued from all dangers of losing any of those common rights by the invasion thereof by the claims of private owners, if such dangers ever existed. That judicial service would be of little value if mere state ownership for the preservation of the common rights were so perverted as to support a claim of state ownership in hostility to such rights, a principle which, in the possibilities of its development, might lead to a serious impairment, if not utter ruin, of a most important trust \* \* \* This court has repeatedly said that the navigable waters of the state have substantially the incidents of tidal waters at common law; that the title to the beds of such waters was reserved for the state by the Ordinance of 1787, and vested in it at the instant it was admitted into the Union, to preserve the public character of such waters with all such incidents; and that the state never has and never can constitutionally impair the trust." (Citing many cases.)

Further on, referring to the case of *Priewe v. Improvement Co.*, 93 Wis., 534, and 103 Wis. 548, the court says:

"It was held, in effect, that the state has no such interest in the beds of navigable lakes that it can treat the same as a subject for bargain and sale or grant the same away to private owners under the guise of police power or otherwise; that it is a mere trustee of the title thereto, under a trust created before the state was formed, to which it was appointed as trustee by its admission into the Union."

We shall have occasion to refer to the case of *Barney v. Keokuk* in other connections, but we refer to it here for the reason that this court said in that decision that it appeared to be the settled law of Iowa that the title of the



riparian proprietors on the banks of the Mississippi extends only to high water mark, and the shore, between high and low water mark, as well as the bed of the river, belongs to the state, and remarked as follows:

"This is also the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so; and especially it is true with regard to the Mississippi and its principal branches."

We refer to this case here too for the reason that the court held that the grants from the Federal Government on navigable streams and waters ended at the shore, although on account of the confusion of holdings in the states, due to the earlier decisions following the English common law tide-water doctrine and on which rules of property may have been built up, the court deemed it best to leave to the states the determination of what rights should attach to riparian ownership by state concession, etc., but the grant from the government ends at high water mark, as declared by this decision. We here quote from the opinion of the court on page 228 of the decision as found in the Lawyers' Edition report:

"It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the Crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only, although the reason of the rule would



equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide-water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation, in many states, of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, *Pollard v. Hagen*, *Supra*, and *Goodtitle v. Kibbe*, 9 How. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *Genesee Chief v. Fitzhugh*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

In the case of *McLennan v. Prentice*, *Supra*, the contention arose over the title to property upon the shore of



Chequamegon Bay. The court, on page 442, uses the following language:

"The question whether the lands or lots lying under the shoal water of the bay, and between the bank and navigable water, are the subject of private ownership, so that they can be conveyed in fee or otherwise, is a very important one, and has recently been much discussed, as well as the rights of riparian owners over the same and out to navigable water. In the case of *Diedrich v. N. W. U. R. Co.*, 42 Wis., 248, it was held that 'a riparian owner upon a natural lake or pond takes only to the natural shore or ordinary low water mark thereof, and that, distinguished from appropriation and occupation of the soil under the water, a riparian owner upon navigable water has a right (unless prohibited by local law) to construct in shoal water, in front of his land, proper wharves or piers in aid of navigation, and at his peril of obstructing it, through the water, far enough to reach actually navigable water; that such riparian rights proper rest upon title to the bank, and are the same whether the riparian owner owns the soil under the water or not; that the general right of appropriating and occupying the soil under the water, when it exists, is not properly a riparian right, and rests not upon title to the bank only, but more directly upon title to the soil under the water'; and subject to these, and certain rights of protection of the land against the water, 'any extension of possession or intrusion into the water beyond the natural shore, whether by the riparian owner or a stranger, without express and competent grant from the public, vests no title in the person who makes it.' "

The court further said that the state is the owner in fee of all of the lands under navigable waters in the Great Lakes, but in trust only for the public uses and purposes of navigation and fishing; that they are subject to state regulation and control under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. On page 444 the court said:



"It is plain that no grant by the state, for purely private purposes, of such lands, could operate to impair or defeat the previously acquired rights of the riparian owner, for the state has no right to make such a grant. The right which the state holds in these lands is in virtue of its sovereignty, and in trust for the public purposes of navigation and fishing. The state has no proprietary interest in them, and cannot abdicate its trust in relation to them, and, while it may make a grant of them for public purposes, it may not make an irrevocable one; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation."

In the case of *Hicks Atty. Gen. ex rel Askew v. Smith*, *Supra*, Judge Winslow in deciding the case said:

"Lake Monona is a meandered lake, navigable in fact. The title to its bed is in the state in trust for legitimate public uses, such as fishing, navigation, and the like; and the state cannot convey it away for private use, nor can it abdicate the trust."

The state of Wisconsin has had considerable trouble with the subject of ownership of beds of navigable rivers, although it has always held that as to lakes the ownership of grantees of lands stopped at the shore, with incidental riparian rights, and that the beds were inalienably vested in the state in trust.

Its trouble over the beds of streams arose in *Jones vs. Pettibone*, 2 Wis., 308, decided in 1853, in a petty case to which little attention was given and in which in a decision of a few lines it was held that the common law doctrine of ebb and flow of the tide applied to render the stream not navigable and that a purchaser from the U. S. in such cases takes to the center of the stream.

The following of this case became troublesome and in later decisions the court of last resort in that state has refined away any title of such a shore owner until it may



be said that whatever title he has in the bed of a navigable stream is no title, and that the state with its trusteeship of the beds of navigable waters holds the same relationship to the beds of streams that it does to the beds of lakes.

For instance, in *Willow River Club vs. Wade*, 100 Wis., 86; 76 N. W. Rep. 273, the court said that the title which a shore owner took to the bed of a navigable stream he holds for the benefit of the public; and after referring to the abrogation of the tidal test of navigability in the case of *Genesee Chief vs. Fitzhugh*, 12 How. 443, said that notwithstanding the plaintiff has the title to the bed of the river, nevertheless it holds the same in trust for the public.

Judge Marshall wrote a separate opinion because he wished to take a broader ground than stated in the first opinion. (Two judges concurred in the first opinion. Bardeen J. concurred with Judge Marshall, and one Justice dissented.) Judge Marshall said that the common law doctrine of navigable waters had been extended to include streams navigable in fact, through the location of the title to the beds of such streams in the state originally, and that though such title by force of state policy has passed to private ownership, such ownership is of such a qualified character as not in any way to interfere with the character of such streams as public waters, judged by the common law test of navigability.

This case then clearly declares that the common law criterion of navigability has been extinguished, and navigability in fact substituted in its place "with all the attendant incidents." Judge Marshall held that the right of fishing in this case could not be sustained as an incident to right of navigation, but upon the broader grounds of rights of fishery in public waters; that a stream navigable in fact is public for all purposes the same as tidal waters at common law, or else the common right of fishery does not exist.

We call special attention to the discussion in this case by Judge Marshall for what he there said became the sub-



stance of subsequent decisions. He said—(page 278 of the Northwestern Reporter) :

"It would be uninteresting, after all the Chief Justice has said, to go over at length the history of the common law doctrine as to public and private streams, the location of the title to the beds of such streams, the reason therefor, to what extent such doctrine has been adopted in this country, and the peculiar reasons for the divergence of opinions of, and apparent conflict between, different courts, so I shall content myself with general statements and a few references to authorities, leading up to the conclusion that all navigable streams of this state were designed originally to be public for all purposes, and that their character in that regard has not changed, notwithstanding the state has, for some purposes, parted with the title which was vested in it in its sovereign capacity, in trust for the preservation and protection of public interests. If the state had not surrendered any of its interests in such lands, but kept the same till the present time, solely for the use for which the same came to it at its organization, the question we now have before us would never have arisen. It would then be conceded without question, by all, that the title to lands under all navigable water within the boundaries of the state, is in the state, and such waters public in the same degree as waters navigable at common law by the test of tidal character.

"All the trouble and confusion regarding the public right of fishing in navigable streams, has grown out of the fact that the title to the beds of such streams has been so generally declared, without qualifying words, to be in the riparian owner, that the real origin thereof, and the real nature of the private ownership have come to be overlooked, and a mere qualified private title, consistent with the trustee capacity of the state for the public purposes of navigation and fishing, to be looked upon as an absolute title resting on, or having all the qualities of, an absolute grant, or at least a grant subject to the right of passage, a title such as the riparian proprietor possessed on a private stream at common law, and such as is held by riparian



proprietors on fresh water streams in New Hampshire, New Jersey, and most of the original 13 states of the Union, where, as said the Chief Justice, the common law, with some exceptions, prevails."

The Justice then said that it is conceded that by the English rule the title of riparian proprietors on navigable streams extends only to high water mark; that the title below that line is in the sovereign in trust for the benefit of the public; that as to lands bordering on other streams, the title extends to the thread thereof, and that navigable streams are only such as are affected by the tides, without reference to navigability in fact, and said that an examination of the subject under discussion will show that whatever changes have taken place in regard to public waters, the principle has been uniformly maintained, that where the absolute ownership of the beds of navigable streams is private, such streams are held not to be public for any purposes, and so far as streams which, by the rules of the common law, were private, are now deemed to be public, the title to their beds is in the state or subject to that use in harmony with the public rights, the same as at common law; that the fiction of navigability, tested by the tidal character of the water, has been rejected and the test of navigability in fact substituted in place of it, only in harmony with the status of the title to the beds of the streams.

After considering the course of judicial determination in certain jurisdictions, the Justice further said (page 279) :

"Without going further into the subject just discussed, it must be conceded that the absolute private ownership of the bed of a navigable stream is inconsistent with its being public for any purpose; that if such be the nature of the riparian proprietor's title, or if it be subject only to the easement of navigation, then the exclusive right of fishing goes with such ownership. So, if the situation of the title to lands adjacent to



navigable streams is stated with strict accuracy in *Jones v. Pettibone*, 2 Wis. 308, to the effect that it extends to the thread of the stream, subject to the right of navigation, which statement has often been referred to, and may be said to form the foundation of the doctrine that the state has parted with the title it formerly possessed to the beds of such streams, then they are private for the purpose of fishing. In my judgment, the condition of the title was not there stated with strict accuracy. An examination of the opinion shows that the title, as to whether absolute or qualified, and if qualified, to what extent, was not before the court, and the fact herein shown, that the title to the beds of navigable streams in all the Northwestern Territory was reserved for public purposes, and, in that portion within the boundaries of this state, vested in it at its organization for such purposes, was entirely overlooked. The observation was made, as in the decision in *Hooker v. Cummings*, *Supra*, by applying common law principles as if the title to the beds of navigable streams were vested in the private owners of the banks by purchase and grant, as in case of fresh water streams at common law."

The Justice then said that if private ownership to any extent exists, it did not proceed from the United States under its patents and that that has long since been firmly settled, and referred to the case of *Barney v. Keokuk, Railroad v. Schurmeier*, *Yates v. Milwaukee*, and to other of the Wisconsin cases, all to the effect that the title to lands bordering on such streams derived from the United States under its patents, goes only to the margin, because title beyond that point was reserved to the state and vested in it when admitted to the Union. Then considering the question as to how, if at all, such title to the beds of streams had ever passed from the state, on page 280 the Justice makes the following clear and succinct statement:

"So we are safe in saying that the title to the beds of all navigable streams of this state passed to the state from the United States with all the incidents of



public waters at common law, including the right of fishing as well as navigation. By what means has that title since changed, if at all, so far as the public is concerned? It will not be claimed that the state has directly parted, or attempted to part, with its title, even if it could effectually do so. By what right then, does the riparian proprietor claim title to the submerged lands under navigable streams, if not based on a direct grant from the general government or the state? The answer, and only answer, is, by force of state policy, so long declared by the court and submitted to as to become a rule of property which has worked a conveyance so far as it reaches, as effectually and conclusively as if the title rested in grant. Such title proceeded from the state, however, by force of its policy, as a concession to the holder of the patent title, and became appurtenant thereto upon such title being conveyed by the government,—a concession not resting for its validity on any direct act of the state through its legislative body, but on mere state policy as declared by the court and acquiescence in for so long a time that it cannot be changed without working great hardship. Therefore, it is said that the conduct of the state has created a rule of property which has all the effect of title by equitable estoppel. This court, in *Olson v. Merrill*, 42 Wis. 203, referring to the observation of the court by Mr. Justice Bradley in *Barney v. Keokuk*, *Supra*, to the effect that the rule adopted in some states, of conceding to riparian proprietors of navigable streams the title to the beds thereof, as at variance with sound principles of public policy, and expressing a doubt whether, as a rule of property, it would be safe to change the doctrine where long established, but that it was for the states themselves to decide whether they would surrender property rights belonging to them in their sovereign capacity, said, that left this state free to adhere to a policy which had been so long established that it would be mischievous to disturb it.

“So the state owns the beds of all navigable rivers between the lines of ordinary high water mark on either shore, except in so far as the rule of property, established by state policy, has taken it away.”



Then referring to the fact that the situation of a riparian owner would, so far as any practical value to him is concerned, be no different whether it is held that his title extended to the middle of the stream or stopped at the margin, and that it really becomes quite immaterial where the legal title rests, if the same is subject to all public uses, Justice Marshall then takes up the consideration of the extent to which the state has surrendered its title to submerged lands originally vested in it, and as to the power of the state to surrender its trust, and declares in positive and unmistakable terms and with unanswerable logic, that the title of the state to submerged lands under navigable waters, whether of lakes or rivers, came to it at the same time, subject to the same incidents and for the same purposes, and must necessarily be governed by the same rules. He said that obviously the mere declaration of the fact by the courts, so long adhered to without challenge as to give it effect as a verity and a rule of property, can go no further than the state could go, pursuant to legislative authority, and after referring to the very positive decision of the supreme court of Wisconsin in the cases of *McLennan v. Prentice* and *Priewe v. Improvement Co.*, *supra*, he made the declaration with reference to the identity of the character of title held by the state in the beds of streams and lakes and ponds above referred to and said further:

"We might proceed at great length, citing decisions of other courts to show that the trust capacity of the state in respect to the beds of navigable waters cannot be surrendered, either directly or indirectly, but as we have shown that this court has twice spoken decisively on the subject, we may safely rest the matter there."

The Justice then proceeds to endeavor to find a way by which he can give force and effect to the proposition declared without directly overruling previous decisions of the court; in substance, to find a way to nullify the effect of the earlier decisions without directly overruling the same. He



says in this discussion that navigable waters include all waters navigable in fact and that the title to all lands under such waters was vested in the state at the time of its organization, in trust, to preserve the public character of such waters, and that such character is the same as that of waters navigable at common law, that if the state has parted with any portion of such title, it has not been surrendered by grant but by mere force of state policy, through the declaration of its courts, but that the state never possessed power to emancipate itself directly or indirectly from its trusteeship in such lands, and that whatever title, if any, the riparian owner has in the bed of streams in that state, is a qualified one and that there is no sound reason to sustain the contention that any further concession has ever been declared or attempted. He says that if such importance had been fully foreseen at the start, the state's interest would have been more rigidly and jealously guarded, and private ownership not have been allowed to invade at all either the public title or the public use. He says that such title (referring to the title to the beds of navigable streams) in all of the territory out of which the north-western states were carved, was vested in them in trust for public purposes of the highest importance, which have grown and are likely to grow with the lapse of years, and he said the state not only never has, but never can, legally abdicate that trust or surrender such title, except subject to all of the public uses for which it was created.

It seems very difficult to discover what there is left of ownership of the bed of a navigable stream by a Wisconsin shore owner more than of a meandered lake or more than of the bays and arms of the Great Lakes. He owns to the shore with incidental riparian rights, appurtenant to the shore, and not with any ownership of the bed in any strict sense. If the state held not a proprietary title, but only a sovereign one, it had no title to convey to another. If the shore owner took any title to the bed from the state, some of these cases say he must take and hold it in



trust, but the court says in these decisions that the trust title is inalienable in the state and that the state cannot abdicate the trust. They say in these decisions that the legislature cannot transfer or give away this title. They say that whatever a riparian owner gets is by concession. If the legislature cannot give away the title the courts cannot. The courts can adopt a policy of *let alone*, but what more?

It all comes down to the final and irresistible conclusion that when navigability in fact was substituted instead of tide water as a test of navigability, and all the incidents attaching at common law to navigable waters in which the tide ebbed and flowed, became attached to such waters as they did, that there was no longer anything which a shore owner could claim except that he owned to the water's edge with riparian rights such as attach to shore ownership and not to bed ownership.

Village of Pewaukee vs. Savoy, 103 Wis. 271,  
79 N. W. Rep. 436.

Priewe vs. Wisconsin Land & Imp. Co., 103  
Wis. 537, 79 N. W. Rep. 780.

Illinois Steel Co. vs. Bilot, 109 Wis., 418,  
85 N. W. Rep. 402.

In all of these cases Judge Marshall wrote the opinions.

In these cases the *Willow River case*, *McLennan vs. Prentice* and other cases are approved. The opinion of Marshall and Bardeen in the *Willow River case* became the substance and foundation for all these other cases. The doctrine is declared vigorously that the state takes the title in trust to submerged land under navigable waters and that it has never abdicated this trust and cannot do so.

In the case of *Rossmiller vs. State*, 114 Wis. 169; 89 N. W. Rep. 839, the opinion was also written by Judge Marshall. It is a strong and able opinion and with the



mention of this case we submit that on these authorities Wisconsin has tried to put itself in harmony with the doctrine of an inalienable trust in the state in the beds of navigable waters, whether lakes or streams, without directly reversing the mistake instituted by *Jones vs. Pettibone*; that in doing so the title which *Jones vs. Pettibone* gave to the shore owner on a navigable stream has been about as effectually wiped out as though the case had been reversed, as the court clearly thinks it should have been long ago. In any cases in that state subsequent to these, if the word title is used in reference to submerged lands under navigable streams, it must be deemed it is the kind of title these cases say the shore owner has and not the kind they say he has not.

In the state of Minnesota the doctrine is well settled as to the sovereign character of the title of the state in the beds of lakes and streams. No distinction is made as to this title under navigable waters nor as to the rights of riparian owners on the bank or shore of such waters. Whether such waters consist of lakes or streams, the title of the shore owner stops at least at low water mark and the title to the beds of the lakes or streams is in the state in its sovereign capacity.

In the case of *Hanford v. St. P. & D. Ry. Co.*, *Supra*, the court said in its opinion on re-argument on pages 111 and 112:

"In this state the title of the proprietor of lands abutting upon navigable waters extends to low water mark; the bed of the stream or body of water, below low water mark, being held by the state, not in the sense of ordinary absolute proprietorship, but in its sovereign governmental capacity, for common public use."

In the case of *Lamprey v. State*, *Supra*, Mr. Justice Mitchell says on page 197 of the opinion:



"The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams."

And on page 198 the court says:

"Our conclusion, therefore, is that upon both principle and authority, as well as consideration of public policy, the common law is, that the same rules as to riparian rights which apply to streams apply also to lakes, or other bodies of still water.

"In this state, we have adopted the common law on the subject of waters, with certain modifications suited to the difference in conditions between this country and England, the principal of which are that navigability in *fact*, and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use."

And further, the court said that the riparian proprietor held his title by reason of the ownership of the shore and not of the bed, and that his title stopped at the water's edge, but with certain incidental riparian rights.

In the case of *Bradshaw v. Duluth Imperial Mill Co.*, *Supra*, on page 65 of the opinion the court said:

"It is the settled law with us that the rights of the state in navigable waters and their beds are sovereign, and not proprietary, and are held in trust for the public as a highway, and are incapable of alienation."

There being no ownership of the bed as such, the right of the appellee to interpose between this appellant and the opposite side of the navigable channel disappears. Their respective riparian rights will be discussed under another head.



## III.

**The Reasons Which Have Impelled the Courts to so Interpret the Language of Boundaries, "Through", "Through the Middle" and "Through the Center", as Applying Continually to the Middle of the Main Deep Water Channel Are Just as Potent to Apply That Description in This Case to the Improved Channel.**

There is no private ownership of the bed to interfere. The shore owner on each side can reach navigable water through the medium of his riparian rights. The submerged line marking the boundary between the respective trust titles of the same character of the two states in the bed, if held to follow the thread of the navigable and navigated channel, for the reasons laid down by the courts, may just as logically be held to follow the improvement of that channel, when made under the circumstances and in the manner shown on this record.

The trial court took this view as the just and practical solution. We submit it satisfies the boundary description; that it is in harmony with the Acts of Congress beginning with the Ordinance of 1787 and including the various acts authorizing the improvement and making appropriations therefor, and effectively applies the principles which have controlled the courts in giving effect to boundary descriptions, which are often as here general.

That this would be an effectual solution of this whole matter cannot be denied. That it is an equitable solution is undeniable. But appellee's position simply is that because the line of deepest water in this channel once trailed through it in a sinuous course, therefore the submerged boundary line must forever duck back and forth, cross and recross the improved way through the middle, and furnish taxing officers a chance to levy upon opposite shore owners' improvements here and there, and furnish owners upon the one side with the opportunity to intervene in every loop of



the thread between the opposite shore and the navigable water. The condition is intolerable and should not be enforced without the strongest reasons.

Counsel have cited two cases outside of avulsion cases upon which they rely to impeach the correctness of the trial court's decision, viz.,

Washington v. Oregon, 211 U. S., 127; 214  
U. S., 205; and  
State v. Bowen, 149 Wis., 203, 135 N. W. 494.

The *Washington v. Oregon* case can have no such application as counsel give it. There the Columbia River had at least two big channels breaking apart some distance from the sea. There was a large body of land between. The north channel was designated in the constitutional boundary between these states. It was at that time the better and main channel, it is true, but even if it had not been, it was designated as the boundary. In time the south channel became the better and more used one. The court said in 214 U. S. at page 215, upon rehearing, that the boundary must remain in the north channel; that

"whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminishing, \* \* \* the boundary is still that channel, the precise line of separation being the varying center of that channel."

This the court said would be true whether the diminishing of the volume of water in the north channel resulted from processes of accretion or because of the jetties constructed by the government into the ocean from the mouth of the river.

The court in the main opinion in this case (See 211 U. S. 127) refused to apply the doctrine of *Iowa v. Illinois* and other cases because in those cases the constitu-



tional boundary had been designated as the middle of the main channel or the middle of the river, for that reason in the absence of avulsion the boundary was the varying center of the channel, and further at pages 134-135 said:

"Now, if Congress, in establishing the boundary between Washington and Oregon, had simply named the middle of the river, or the center of the channel, doubtless it would be ruled that the center of the main channel, varying, as it might, from year to year through the processes of accretion, was the boundary between the two states."

But the north channel was designated and of course that must remain the boundary just the same as if some river other than the Columbia had been the boundary.

Here, however, in the case at bar, the improved fair way is in the main channel as appellee claims it always was; as said before, it is in the middle of that channel, as they claim the constitution provided it should be. There is nothing in the *Washington* case derogatory to our conclusion. The *Wisconsin* case we do not deem of any persuasive force here. It arose upon a trifling question of prosecuting certain fishermen. The states had concurrent jurisdiction on the Mississippi as they have upon the St. Louis. The defendants were prosecuted, however, for violating certain Wisconsin statutes concerning fishing. The river had been diverted from one channel to another by certain railroad improvements, although there was some water in the old channel. A question was certified up as to whether the boundary line had thereby become changed. The court said no. It was not a question in that case of improving or even shifting the fair way in the same channel, but of diverting the river to a totally different channel.

Here again let us remind the court that the term "artificial channel" is used by counsel we think unwarrantably and in a way tending to confusion. Let the court picture this body or channel of water, whether it be a river or not,



with its high banks, and picture in its mind the snakelike thread of deepest soundings in that channel; then having in mind the established dock lines upon either side, consider the improved fair way in the middle of the channel, and between these dock lines, dismissing the idea conveyed that the government has created a new and artificial channel for these waters, and the court will then be in a position to determine whether this should not be held to be the constitutional boundary line in that channel, and whether any other line would be consistent with the purpose of placing the boundary there at all, and whether any other line would not defeat the very purpose of the government in reserving the paramount control under which this improvement was made. We know of no evidence in the case at bar that shows where the line of deepest water was in this channel at the time of the admission of these states into the Union, although by reference to soundings shown on the maps it appears where it was at later dates.

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#### IV.

**Among the Most Valuable of Rights Incident to Shore Ownership is the Right of Access to the Navigable Waters of the Boundary Stream or Other Body of Water, Which Includes the Right to Build Wharves and Docks in the Aid of Such Enjoyment or Which Are Convenient to Navigation. These Rights Will Not be Cut Off by the Presence of a Technical Submerged Boundary Line Between the Trust Estates in the Bed Held by These Two States, Wherever the Court Determines It to be.**

This was urged by appellant in both lower courts. The view of the Circuit Court on this question was apparent enough, but it is obvious why that court did not specifically decide this question.

The Circuit Court of Appeals resolved this question, without any direct consideration, against this appellant, and



the eighth assignment of error is laid against that conclusion and of course other assignments such as the first and second likewise apply to it.

- Sullivan v. Mobile, 110 Fed., 186.  
 Yates v. Milwaukee, 10 Wall., 497.  
 Paine Lumber Co. v. United States, 55 Fed. 854.  
 Sage v. The Mayor, 154 N. Y., 61.  
 Harding v. Minneapolis &c. Ry. Co., 84 Fed., 287.  
 Richardson v. United States, 100 Fed. 714.  
 Dutton v. Strong, 1 Black, 1; 17 L. Ed. 29.  
 Railroad Co. v. Schurmeier, 7 Wall., 272.  
 Packer v. Bird, 137 U. S. 661; 34 L. Ed. 819.  
 St. Louis v. Rutz, 138 U. S. 226; 34 L. Ed. 941.  
 Hardin v. Jordan, 140 U. S. 371; 35 L. Ed. 428.  
 Kaukauna v. Green Bay, 142 U. S. 254; 35 L. Ed. 1004.  
 Water Power Co. v. Water Comm'rs, 168 U. S. 349; 42 L. Ed. 497.  
 Atlee v. Packet Co., 21 Wall (88 U. S.) 389; 22 L. Ed. 619.  
 Mitchell v. Smale, 140 U. S. 406; 35 L. Ed. 442.  
 Whitaker v. McBride, 197 U. S. 510; 49 L. Ed. 857.  
 United States v. Chandler-Dunbar Co., 209 U. S. 447; 52 L. Ed. 881.

*Sullivan Timber Co. v. Mobile, Supra.* The Sullivan Timber Company had the legal title to the upland abutting on the River Mobile. They made improvements and wharves over the shore, out to the channel or navigable part of the river. The City of Mobile, claiming to own the title to the swamp or submerged lands, brought actions in



ejectment on the different tracts against the Timber Company to compel their removal. The Timber Company did not claim to own the land beyond the shore, but did have title to the upland abutting thereon and they brought this suit in equity to protect their property and their occupation of the submerged land. The court said:

"There is equity in the bill, in that it seeks to protect the complainant's property or proprietary rights as a riparian owner from invasion or impairment, and to settle and quiet the exercise and enjoyment of the same."

On page 192 the court said:

"It is now well settled that the title and rights of riparian or littoral proprietors in the shore and soil below high water mark of navigable waters are governed by the local laws of the several states, subject to the rights granted to the United States by the Constitution \* \* \* In the opinion of the Supreme Court of the United States in the case of *Yates v. City of Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, it is said that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right in the soil below high water mark, and the right to build out wharves so far, at least, as to reach water really navigable.

"The court also said that 'this riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.' This decision has been cited in several succeeding opinions by the Supreme Court."

The court then reviews various other cases and says, on page 193:

"The cases cited, I think, are authority for the proposition that riparian rights, when recognized as existing by the law of the state or by local usage, are a valuable property. Among those rights are access to the



navigable part of the river from the front of his lot by an owner whose land is bounded by or abuts on the river, and the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public."

*Yates v. Milwaukee, Supra.* The subject matter in this case is the same as in the case of *Yates v. Judd*, 18 Wis. 118. Yates, being the owner of a lot at the intersection of the Menominee and Milwaukee Rivers, built a wharf extending one hundred feet into the Milwaukee River, in order to reach the navigable part of the stream. The Wisconsin Legislature had previously authorized the Common Council of Milwaukee, by ordinance, to establish wharf and dock lines upon the banks of the Menominee and Milwaukee Rivers and to restrain and prevent encroachments. The city, by ordinance, declared this wharf to be an obstruction to navigation and ordered it abated. The suit was brought to restrain the city from destroying the wharf. Mr. Justice Miller, in deciding the case, said:

"As to the first of these propositions, it does not seem to be necessary to decide whether the title of the lot extends to the thread of the channel of the river, though if the soil was originally part of the public lands of the United States, as seems probable, the case of *Railroad Company v. Schurmeier*, 7 Wall. 272, would limit the title to the margin of the stream.

But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are accesses to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this court in the



case of *Dutton v. Strong*, 1 Black 23, (66 U. S., 29), and *Railway Company v. Schurmeier*, just cited."

The court further said:

"\* \* \* we are of opinion that the City of Milwaukee cannot, by creating a mere artificial and imaginary dock line, hundreds of feet away from the navigated part of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose."

The court further said:

"The law which governs the case is the common law, on which this court has never acknowledged the right of the state courts to control our decisions except, perhaps, in a class of cases where state courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the state.

"This is not such a case."

*Paine Lumber Co. v. United States, Supra.* This case grew out of a claim on the part of the Lumber Company that by the improvements made in the Fox and Wisconsin Rivers by the United States, including the purchase by the government of a certain dam for the maintenance of the same, the property of the complainant had been flooded and damaged. There was involved a dock constructed by the complainant and the injury thereto. In charging the jury Judge Jenkins said on pages 866 and 867:

"You will therefore consider if there has been any intrusion into this river by the plaintiff's premises, beyond this high water line, as you may determine it. You will consider the object, the nature, and the extent of that intrusion, and whether it obstructs the navigation of that river; whether it goes so far, and includes that part of the river which is navigable in fact,—navigable for crafts usually plying its waters. If this structure, this dock, has been extended beyond the line of navigable water so that it becomes an intrusion to navigation, an obstruction to the commerce, taking into consideration the locality, the commerce that plies there,



the width of the river,—if it has extended into waters navigable in fact,—then, so far as it extended, the plaintiff cannot claim damages for injuries to that property by act of the government in improving the navigation of that river. But if it has not extended into navigable water,—waters navigable in fact,—if it is not an obstruction to navigation, then that property cannot be injured without compensation being made for the injury. This riparian right is property, as has been determined by the Supreme Court of the United States, and is valuable, and, although it must be enjoyed in due subjection to the rights of the public, it is a right of which, when once vested, the owner can only be deprived in accordance with established law \*

\* \* The right of the government to improve the navigation of a navigable river is paramount, and, as against the exercise of that right, the plaintiff had no right to obstruct navigation by encroaching upon the navigable part of the river \* \* \* But the plaintiff had the right to construct or maintain its dock in the river so far as to reach that point which was navigable in fact."

*Sage v. The Mayor, Supra.* This is a long case and involves the consideration of many matters, including grants, state statutes, etc., not pertinent here. It grew out of a contention between the owner of land abutting on the Harlem River, who, by many mesne conveyances had succeeded to the rights of the grantees of Colonial Governor Nichols, and the rights of the city, accruing under a subsequent grant of the streams and of all ungranted lands on the Island of Manhattan by Colonial Governor Dongan. The only value of the case here is the declaration of the principle contained in it, that even though the title of the owner of the upland, washed by the waters where the tide ebbs and flows, did not extend below high water mark, yet, as a riparian proprietor, he was invested with certain valuable privileges and easements, including the right of access to the navigable part of the river in front of his property for the purpose of loading and unloading



boats, drawing nets and the like, and that these riparian rights were property belonging to the riparian owner of which he could not be deprived except by his consent or by due process of law, although he could only use them subject to the rights of the public.

In *Harding v. Minneapolis etc., Ry. Co., Supra*, it was held that in case of the existence of no other facts furnishing a ground for a contrary view, and in case of a complete survey by the government of the lands abutting on a navigable stream, and the omission to note or take account of a small island lying between the shore and the main and navigable channel of the river, the rights of the riparian owner would extend out and over such island.

In *Richardson v. United States, Supra*, the Circuit Court for the Eastern District of Virginia, speaking of riparian rights, said, on page 717:

"It is true that the beds of navigable streams are the property of the state \* \* \* But the state holds these beds in trust for the public for the purposes of commerce and navigation, and subject to these purposes; and the Constitution has given Congress sole control over navigation and commerce. So the persons who hold under the state are affected with the same trusts. Therefore riparian ownership on navigable waters is subject to the obligation to suffer the consequences of the improvement of the navigation under an Act of Congress passed in the exercise of the dominant right of the government in that regard, and damages resulting from the prosecution of such an improvement cannot be recovered in the Court of Claims." Citing *Gibson v. United States*, 166 U. S. 269; 21 L. Ed. 996.

*Dutton v. Strong, Supra*. Dutton owned a pier at Racine, Wisconsin, which extended into the lake and served the purpose of a landing place for freight and storage. Strong's ship was driven by stress of weather to the neighborhood of this pier, and the captain, fearful of going



ashore, made his vessel fast to it. The violence of the gale increased the pull on the hawser, by which the ship was moored, to such a degree that the piles began to give way. The owner of the pier warned the captain to cut loose, which he did not do. The owner then cut the hawser himself and the vessel was driven upon another pier, and, to prevent utter destruction, was scuttled. The suit was to recover damages for cutting the hawser. The jury in the trial court, under the charge of the judge, found for the plaintiff. In reversing the judgment, Justice Clifford in the course of his opinion, said:

"Bridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays and arms of the sea, as well as on the lakes; and where they conform to the regulations of the state, and do not extend below low water mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation. Whether a nuisance or not is a question of fact; and where they are confined to the shore, and no positive law or regulation was violated in their erection, the presumption is that they are not an obstruction, and he who alleges the contrary must prove it. Wharves, quays, piers and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic states by riparian proprietors at a very early period in colonial times; and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time. *Ang. Tide Wat.* p. 196.

Our ancestors, when they immigrated here, undoubtedly brought the common law with them, as part of their inheritance; but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects. Dif-



ferent states adopted different regulations upon the subject; and, in some, the right of the riparian proprietor rests upon immemorial local usage. No reason is perceived why the same general principle should not be applicable to the lakes, although those waters are not affected by the ebb and flow of the tide; and, consequently, the terms 'high and low water mark' are not strictly applicable. But the lakes are not navigable, in any proper sense, at least in certain places, for a considerable distance from the margin of the water. Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases."

*Railroad Company v. Schurmeier, Supra.* In the statement of this case it is said to be necessary, in a preliminary way, to refer to certain statutes of the United States, governing the surveys and descriptions of public lands, and reference is made to the Acts of May 17, 1796, First Statutes at Large 464; May 10, 1800, Second Statutes at Large 73; February 11, 1805, Second Statutes at Large 313. These statutes enact that the public lands shall be subdivided into townships, sections and quarter sections, and that these subdivisions shall be bounded by north and south and east and west lines, unless where this is rendered impractical by meeting a navigable water course, etc.

These acts of Congress require the contents of each subdivision to be returned to and a plat of the land survey to be made by the Surveyor General; this makes necessary an accurate survey of the meanderings of the water course where the water course is the external boundary, and the line showing the place of the water course and its sinuosities, courses and distances is called the meander line.



This proceeding was begun in an inferior court of Minnesota by Mr. Schurmeier against the Railroad Company to enjoin the building of its railroad upon certain ground in the City of St. Paul, bordering upon the Mississippi. The Railroad Company defended and claimed to be the owner in fee of the *locus in quo*. The case was appealed to the Supreme Court of the United States from the Supreme Court of the State of Minnesota. It became necessary to discuss the rights of riparian proprietors to the property in question, and on page 275 is found a map showing this property to have been originally a small area containing 2.78 acres adjacent to the shore, at high water completely covered with water and at low water connected with the shore by a narrow neck of land. Before the suit was begun this land had been filled in and made a part of the main body of the land. In the course of his decision, Justice Clifford said:

"Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream; but the better opinion is, that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be and remain public highways. Grants of land bounded on rivers above tide-water, says Chancellor Kent, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway \* \* \*

The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the center of



it, and he, consequently, holds that the fee passes to that extent. Decided cases of the highest authority affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent country. Except in one or two states, those rules have been adopted in this country, as applied to rivers not navigable, when named in a grant or deed as a boundary to land. Substantially the same rules are adopted by Congress as applied to streams not navigable; but many Acts of Congress have provided that all navigable rivers or streams in the territory of the United States, offered for sale, should be deemed to be, and remain public highways."

The court further said:

"Viewed in the light of these considerations, the court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways.

"Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide. *Dutton v. Strong*, 1 Black 23 (66 U. S. XVII, 29)."

*St. Louis v. Rutz, Supra.* In this case the attempt was to limit the grant so that no rights would be carried beyond low water mark, although the common law rule prevailed in Missouri, and a portion of the decision rests upon the application of that rule, which is not applicable here. It is to be noted that the court, in the decision, confirming some of the other cases hereinbefore reviewed, stated:

"The plaintiff was a riparian proprietor on the river. If his title to the land in question is not sus-



tained, he is no longer such riparian proprietor and is cut off from access to the river. Among his rights as a riparian owner are access to the navigable part of the river from the front of his land, and the right to make a landing, wharf or pier for his own use or for the use of public."

*Hardin v. Jordan, Supra.* The question in this case was how far the rights of a shore owner on a small lake near Chicago extended. The case was decided by a divided court and on the construction of the local law of Illinois. A majority court gave the riparian owner the title to the center of the lake; the dissenting judges, several of the ablest on the bench, were willing to give that title only to the shore, leaving him his right to enjoy his riparian rights. Most of the opinion is concerned with the policy adopted by the Supreme Court of the United States to leave to the local courts of the states the construction as to what rights riparian owners should have as appurtenant to their grants from the government, the government not assuming to grant beyond the shore line.

*Kaukauna v. Green Bay, Supra.* This case grew out of a contention between various parties as to their respective rights on the Fox River, involving the improvement of that river as first undertaken by the State of Wisconsin and afterward by certain incorporated companies, and finally by the United States. The construction of a dam and water power, and a right to take water from the pond were involved in the controversy. The case is confirmatory of the policy adopted by the federal courts to permit the state courts to determine the question, subject to the public rights, and the case therefore dealt with the consideration of the course of judicial determination in Wisconsin up to that time, the last state decision referred to being that of *Janesville v. Carpenter*, in 77 Wisconsin, wherein the court said with reference to a riparian proprietor:



"He may construct docks, landing places, piers and wharves out to navigable waters, if the river is navigable in fact, but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes."

*Atlee v. Packet Co., Supra.* This is a case on appeal from the Circuit Court for the District of Iowa, decided by Mr. Justice Miller. Atlee had constructed a pier in the navigable part of the Mississippi River. A barge of the Packet Company had been sunk by colliding with this pier and Atlee had been held in damages. Atlee claimed the damages had been wrongfully assessed and that the libellants were in fault, and at least that the damages should be divided. The Supreme Court held that Atlee had no right to erect the pier where it was. Mr. Justice Miller in deciding the case said:

"The navigable streams of the country would be of little value for that purpose (navigation) if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. Wharves and piers are as necessary, almost, to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect they must reach so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides."

While adhering to this doctrine and the right to wharf out to navigable water, etc., in aid of navigation, the court held that the structure erected by Atlee in the navigable channel of the river was unsupported by any of these considerations and was not in aid of navigation but was a menace thereto.



*Mitchell v. Smale, Supra.* This is another case arising upon Wolf Lake near Chicago, Illinois. It is ruled by the case of *Hardin v. Jordan* reported in the same volume. It would seem as though they referred to the lake in this case as non-navigable.

The cases of *Berry v. Snyder*, 3 Bush. 266 (Ky.), *Blanchard's Lessee v. Porter*, 11 Ohio 138, and *Sherlock v. Bainbridge*, 41 Ind. 35, show that although the northern boundary of the state of Kentucky, by virtue of the terms of the cession of the Northwest Territory to the United States by the state of Virginia, is at low water mark on the north side of the river, nevertheless land owners on the northerly side of the river are held to own to low water mark, and they enjoy riparian rights on the river unimpeded by the state line. The interpretation given by this court in cases cited in the earlier part of this brief to the cession north of the Ohio River, was clearly to give effect to the right of access of the state of Indiana and its citizens, as the Kentucky boundary was placed at low water mark, although Kentucky owned the river.

The dissenting opinion of Judge Robertson in the Kentucky case, declining to apply the common law doctrine to the state of Kentucky, is very vigorous and is interesting reading.

In *Stockley v. Cissna*, 119 Fed. Rep., 812, which is a case relied upon by appellee, the court said at pages 834-835:

"In *Goodwin v. Thompson*, 15 Lea, 209, 54 Am. Rep. 410, it was held that the title to the soil under the waters of streams navigable in a legal sense could not be acquired by individuals under the general land laws of the state, and a grant which expressly covered the bed of the French Broad river was held void. The opinion of the court was by Associate Justice Cooper,—a very able and discriminating judge,—and is founded upon a consideration of the policy of the state. In conclusion, the learned judge said:



“ ‘We think that the public use of our navigable rivers imperatively requires that the soil under the water should be in the state in trust for the public, that the title to the soil under such streams was not intended to be secured by individuals under our general land laws, and that any person setting up a claim thereto must be able to show an express legislative grant.’ ”

### MINNESOTA AND WISCONSIN.

In Minnesota the owner of shore lands takes to the shore with incidental riparian rights, and no distinction is made between waters of lakes, streams, or bays, or arms of the Great Lakes. The title to the bed of any navigable waters is in the state, in sovereign and not proprietary capacity, as an inalienable trust, and no private ownership can be had thereunder. The only right in or use of the bed, which any private owner can obtain, is such as he may enjoy in the nature of riparian privileges incidental to the shore ownership, which includes the right to wharf out in front of the shore proper and for access to the navigable water. Such riparian estate is a valuable estate, includes the right of occupancy and improvement, subject to the public use, if the same be authoritatively asserted, at least as far out as the dock lines established by authority of law, and includes the right of access in front of shore property to reach navigable waters.

The Minnesota Court has pursued a consistent course on these subjects and in entire harmony with the views expressed by this court on these questions. We do not review but merely cite these cases. What they hold cannot be questioned.

Schurmeier v. Railroad Company 10 Minn.  
82, (Gil. 59),  
Brisbine v. Railway Co., 23 Minn. 114,



St. P. etc., Ry. Co. v. First Div. etc. Ry. Co., 26  
 Minn. 31,  
 Morrill v. St. Anthony Falls Water Power Co.,  
 26 Minn. 222,  
 Union Depot etc., Co. v. Brunswick, 31 Minn.  
 297,  
 Lake Superior Land Co. v. Emerson, 38 Minn.  
 406,  
 Miller v. Mendenhall, 43 Minn. 95,  
 Hanford v. St. P. & D. Ry. Co., 43 Minn. 104,  
 Wait v. May, 48 Minn. 453,  
 Gilbert v. Eldridge, 47 Minn. 210,  
 Bradshaw v. Duluth Imperial Mill Co., 52  
 Minn. 59,  
 Everson v. City of Waseca, 44 Minn. 247,  
 Lamprey v. State, 52 Minn. 181,  
 Witty v. Board of Co. Comm'rs, 76 Minn. 286,  
 Shell vs. Matteson, 81 Minn. 38.  
 See also Hobart v. Hall, 174 Fed. 433 and 186  
 Fed. 426.

The following is a list of Wisconsin cases upon the  
 subject of shore ownership some of which we have already  
 reviewed in considering the subject of title to beds of non-  
 navigable streams and streams navigable by the test of  
 navigability in fact, but not so by the tidal test:

Jones v. Pettibone, 2 Wis. 308; Reprint page  
 225;  
 Walker v. Shepardson, 4 Wis. 486; Reprint  
 page 495;  
 City of Milwaukee v. Milwaukee etc. Ry. Co.,  
 7 Wis. 85, Reprint 76;  
 Mariner v. Schulte, 13 Wis. 692; Reprint  
 page 775;  
 Arnold v. Elmore, 16 Wis. 509; Reprint page  
 536;



- Yates v. Judd, 18 Wis. 118; Reprint page 126;  
 Wisc. Imp. Co. v. Lyons, 30 Wis. 61;  
 Olson v. Merrill, 42 Wis. 203;  
 Doorman v. Sunnuchs, 42 Wis. 233;  
 Diedrich v. N. W. U. Ry. Co., 42 Wis. 248;  
 Cohn v. Wausau Boom Co., 47 Wis. 314;  
 Norcross v. Griffiths, 65 Wis. 599;  
 Chandos v. Mack, 77 Wis. 573;  
 McLennan v. Prentice, 85 Wis. 427;  
 Reysen v. Roate, 92 Wis. 543;  
 Priewe v. Wis. Land & Imp. Co., 93 Wis. 534;  
 Ne-Pee-Nauk Club v. Wilson, 96 Wis., 290; 71  
     N. W. Rep. 661;  
 Willow River Club v. Wade, 100 Wis. 86; 76  
     N. W. Rep. 273;  
 Mendota Club v. Anderson, 101 Wis. 479; 78  
     N. W. Rep. 185;  
 Village of Pewaukee v. Savoy, 103 Wis. 271;  
     79 N. W. Rep. 436;  
 Priewe v. Wis. Land & Imp. Co., 103 Wis. 537;  
     79 N. W. Rep. 780;  
 Illinois Steel Co. v. Bilot, 109 Wis. 418; 85  
     N. W. Rep. 402;  
 Atty. Gen. ex rel Askew v. Smith, 109 Wis.  
     532, 85 N. W. Rep. 512;  
 Rossmiller v. State, 114 Wis. 169; 89 N. W.  
     Rep. 839;  
 Abbott v. Cremer, 118 Wis. 377; 95 N. W.  
     Rep. 387;  
 McCarthy v. Murphy, 119 Wis. 159; 96 N. W.  
     Rep. 531;  
 Franzini v. Layland, 120 Wis. 72; 97 N. W.  
     Rep. 499;  
 Walls v. Cunningham, 123 Wis. 346; 101 N.  
     W. Rep. 696;  
 Sliter v. Carpenter, 123 Wis. 578; 102 N. W.  
     Rep. 27;



Minehan v. Murphy, 149 Wis. 14; 134 N. W. 1130;

Kelley v. Salvas, 146 Wis. 543; 131 N. W. 436;

Farris v. Bentley, 141 Wis. 671; 124 N. W. 1003;

Menominee River Lbr. Co. vs. Seidl, 149 Wis. 316; 135 N. W. 854;

Milwaukee &c. Fuel Co. vs. Milwaukee, 152 Wis. 247; 139 N. W. 540;

Diana Shooting Club vs. Husting, 156 Wis. 261; 145 N. W. 816.

In *Diedrich vs. N. W. U. Ry. Co.*, 42 Wis. 248, and *Delaplaine vs. C. & N. W. Ry. Co.*, 42 Wis. 214, it is held that the owners of land abutting on meandered lakes take only to the shore, but with incidental riparian rights. They hold that riparian rights follow the ownership of the bank and not the bed; that navigability embraces that which may be made navigable by improvement; that while a shore owner has the right of navigation on the river like every other subject, he has connected therewith an exclusive access to and from his particular wharf not held in common with the rest of the public, and that it becomes a form of enjoyment of the land and of the river in connection therewith, the disturbance of which may give rise to an action or be restrained by injunction. The court said that if the proprietor owned the bed of the stream it might possibly give him some additional rights, but the court does not point out what such rights are, nor how they could exist.

In *Cohn vs. Wausau Boom Co.*, 47 Wis. 314, the court held:

"It is settled in this state that a riparian owner on navigable water may construct in front of his land, in shoal water, proper wharves, piers and booms, in aid of navigation, at his peril of obstructing it, far enough



to reach actually navigable water. This is properly a riparian right, resting on title to the bank, and not upon title to the soil under water. It is a private right, however, resting, in the absence of prohibition, upon a passive or implied license by the public; is subordinate to the public use, and may be regulated or prohibited by law."

All the rights awarded plaintiff in this case were accorded to him as the riparian owner. No theoretical ownership of the bed cut any figure or could have made any difference in the case.

Even in *Chandos vs. Mack*, 77 Wisc. 573, a case much relied upon by appellee, where the right to a low and sometimes submerged island between the shore and navigable channel was awarded to the shore owner, the right was made dependent upon shore ownership as a riparian incident. The government had shown no intention to retain an interest in it.

In *McLennan vs. Prentice*, 85 Wisc. 427, the court held with reference to a shore owner on Chequamegon Bay at Ashland, that such owner takes only to the natural shore or low water mark and that, distinguished from appropriation and occupation of the soil under the water, a riparian owner has the right to construct in shoal water in front of his land proper wharves or piers in aid of navigation, etc.; that such rights are the same whether the riparian owner owns the soil under the water or not; that the state has no proprietary interest in the bed, but holds the title in virtue of its sovereignty in a trust which it cannot abdicate, and that no grant for private purposes can be made of it.

In *Priewe v. Wisc. Land & Imp. Co.*, 93 Wisc. 534, the court at page 547 quoted from *Cohn v. Wausau Boom Co.* the portion which we have given above, and further on the same page said:

"Assuming that the state had plenary power over the lake in question and the land beneath its waters,



when exercised in aid of commerce or any other legitimate public purpose, yet we are constrained to hold that it had no power to arbitrarily take away or destroy such rights of the plaintiff, as such riparian owner, without his consent, and without compensation, and without due process of law, and for the sole purpose of benefiting some other riparian owner, or for any other mere private purpose."

This case arose under a drainage act, and a strip of land had been uncovered along the original shore owned by the plaintiff, by the drainage of the lake. The court held that plaintiff had not lost his riparian rights, although he had consented to the drainage. As he would have owned the bed in case of reliction the court gave him the strip uncovered by the act of drainage authorized by the state, in virtue of his ownership of the shore, and as a riparian right incident thereto, and allowed him still to extend to the water, and this although the recession of the water had been created not by natural but by artificial causes.

In *Atty. Gen. ex rel Askew vs. Smith*, 109 Wisc. 532, the court held that a structure built upon the bed of the lake for private uses was an invasion of the state's trust title and of the right of the public; that a pier may be legally built by the riparian owner through the shoal water to navigable water, but if built by one not a riparian owner it is an unauthorized structure.

To the same effect is *McCarthy vs. Murphy*, *Supra*.

In the case of *Franzini vs. Layland*, *Supra*, the court said that on a navigable river a riparian proprietor takes to the center thereof, by such a qualified title as will not violate the public rights, and that such riparian proprietor, nothing appearing to the contrary, owns as incident to the shore all the islands opposite the same so far as his riparian rights extend.

In *Farris vs. Bentley*, 141 Wis. 671, the Wisconsin court held that a patentee on a navigable stream



takes by favor or concession of the state to the center of the stream midway between the banks, regardless of the navigable channel, subject to the rights of the public in the stream, and that the rule is modified in case of a boundary river in order to reach the main navigable channel.

This case is a little queer in that the court favor or state concession seems to go only to the middle point, when the river is not on the state boundary, and to the navigable channel when it is. However, as under the principal cases the state could concede nothing, could part with nothing which it held in trust, and if it did the taker must hold it in trust, it is not to this myth of a title in the bed, but to the riparian right of access, as the owner of the shore property, that such an owner must look for his rights upon the river.

*In re Trempealeau Drainage District*, 131 N. W. 838, the Wisconsin court said at p. 840:

"It is well established in the law of this state that the rights of riparian owners on navigable waters rest upon the title to the bank, etc."

Therefore, we submit that under Wisconsin decisions and Minnesota decisions the riparian owner has this full right of access to the navigable water as incidental to the ownership of the bank, and that in Wisconsin he has no more than he has in Minnesota, and that when this channel was improved, the Wisconsin owner was cut off from coming over it and going beyond it.

The Government had the right to make the improvement; under all these cases beginning with the Federal cases, the controlling principle and the thing important has always been so to construe the laws of the United States as to give free access of the shore owners and of the several states and their citizens to the navigable water, and it was never the intention to permit such a construction thereof to be made as would defeat that purpose by the location,



through interpretation, of the submerged trust estate boundary between the states.

The case of *Diana Shooting Club vs. Husting*, 156 Wis. 261, contains some interesting statements, coming as they do from a Wisconsin court. The action was trespass against one who persisted in hunting on the supposed preserves of the plaintiff's club, embracing a bayou and low lands bordering on Rock River, leased from the riparian proprietor and supposed proprietor of the river bed. The court referred to the ordinance of 1787 and the preservation thereunder of the navigable waters leading into the Mississippi and St. Lawrence as common highways free to the public, etc., and of the like provision being contained in the Wisconsin Enabling Act and Constitution.

The court said that at common law on tidal waters the right of hunting and fishing were incidental to the right of navigation; that navigability in fact has been held sufficient in Wisconsin to constitute a stream navigable; that so far as these rights are concerned, it is entirely immaterial who owns the title to the bed, the state or riparian owner; that the state cannot alienate its trust in the ownership of the bed; that it would no doubt have been more logical to hold that private ownership ends where navigability begins; that there is nothing inconsistent in the doctrine of private ownership of beds of navigable streams subject to all the burdens and incidents of navigation; that as long as the state secures to the people all the rights they would be entitled to if the state owned the beds, it fulfills the trust; that riparian owners only have a qualified title in the beds; that it is perfectly logical and consistent to extend to our navigable waters such rights as were by the common law of England extended to navigable waters under the tidal test; that the Wisconsin court had never been called upon to determine the right of the people to hunt on navigable waters of streams in which the title to the beds was



in private parties; that navigable waters are public waters and as such should enure to the public; and that riparian proprietors took title to lands under navigable waters with notice of the trust, which had been created in favor of the public before the state was admitted, and before they acquired their lands.

Two judges did not sit. Judge Timlin concurred in the result because of lack of evidence of certain facts, but held that hunting wild fowl was not a right incident to navigation, and he dissented from that part of the decision.

Under this case it is difficult to see what private title as owner of the bed a shore owner has in Wisconsin. The fact is he has the rights incident to ownership in the bank, that are everywhere recognized to be possessed by a riparian owner, and no more. He cannot do a thing except to use the same in aid of navigation through the exercise of the ancient right of access to navigable water from his shore land.

What right has Whiteside then to cross over from his shore land, straddle the improved highway and claim access to the old closed way in order that he may intervene between Norton and deep water?

In *State ex rel Thomas Furnace Co. vs. Milwaukee*, 156 Wis. 549; 146 N. W. Rep. 775, the court said on page 776 that there were three interests in the river bed: The qualified title of the riparian proprietor, paramount to this the public interests represented by the state title, and paramount to both of these the governmental or sovereign interest of the United States which it might exert.

This is inconsistent with any ownership of the bed by Whiteside upon which he can predicate a private ownership of the little island that grew thereon. Whiteside has gone as far as he can go as a riparian proprietor when he goes out to the improved navigable channel.



## V.

**The True Character of These Waters at the Locus in Quo Up to and Inclusive of Spirit Lake is That They Are Part and Parcel of Lake Superior and Constitute But an Arm or Beginning of the Great Lake.**

**The Title of a Shore Owner Stops at the Shore With Appurtenant Rights to Wharf Out and Thereby Reach the Navigable Waters in Front of His Shore Premises.**

We respectfully urge that the court erred in not holding the above to be true, and erred in holding these to be waters of the river.

Notwithstanding the persistency with which counsel, from the framing of the answer to the writing of their brief, contend this to be St. Louis River, we believe the above proposition to be firmly established in this case. It rests upon the facts shown in the record, it is supported by the authorities hereinafter cited, and it follows as a natural sequence from the cases hereinbefore submitted. If this proposition is sustained by the court, there is nothing left of the defense for the reason:

(1) The defendant admittedly cannot then claim the ownership of the bed.

(2) Then, no matter where the interstate line lies in the bottom of these waters, the defendant could not stick himself in this arm of the sea in front of plaintiff and say, "You shall pay tribute to me before you reach navigable water."

(3) There would be no occasion to apply the doctrine of *the thalweg*, only exceptionally applied to bodies of water.

(4) There could be no serious claim made to ownership of the island. It did not grow upon a bed owned by appellant, neither was it left an unsurveyed, negligible quantity near his shore, for it was not then in existence, nor did it accrue to him by accretion. It was not near his shore.



For these reasons counsel have ever spent much of their argument upon the claim that the lands of these contestants abut upon a river. While we wish to consider the matter of the little island in question to some extent separately, it must of necessity come in for some notice in a discussion of the above proposition, for in some of the cases sustaining this point islands were involved and held to be in the waters of the lake, and to pass with the bed to the state in sovereign ownership.

The defendants, both Whiteside and Tallas, have in their answers strenuously alleged these waters to be the waters of the St. Louis River and they allege that the St. Louis River, after a very strangely divided course, flows into Lake Superior between Minnesota and Wisconsin Points; that is to say, they undertake to claim that the natural entry, connecting the Bay of Duluth or Superior Bay with Lake Superior proper, between these points, is the St. Louis River emptying into the lake. The complaint alleged (paragraph 9) that the St. Louis River is a stream that has its source in the lakes and forests some seventy-five miles northward from the City of Duluth and is for the most part a rapid stream, flowing with great velocity, through well defined, and for a long distance natural rock-walled, banks, down steep declivities and over a rocky bed, until its waters form the first falls above the Indian Village mentioned in the Constitutions of these states, below which its waters become mingled with those of Lake Superior at some point above Spirit Lake; that it is and always has been navigable below the first falls above the Indian Village and navigated by multitudinous craft engaged in the navigation of the Great Lakes and the arms thereof. The complaint further alleges the various acts of Congress and the improvements made in aid of navigation of these waters, all of which are practically admitted in the answers of all of the defendants. The complaint alleged that the lands of the plaintiff and the defendants Whiteside and Alexander border upon the Bay of St. Louis. The answers of both de-



fendants deny this and allege that they border upon St. Louis River and they deny that the Bay of St. Louis is a part of Lake Superior; they allege all of these waters to be enlargements of the river and that the river contracts between Rice's Point and Connor's Point and enlarges again into Superior Bay, and finally empties into the lake between Minnesota and Wisconsin Points. There is some quibbling in the answers with respect to the navigable character of these waters, but, nevertheless, not only in the bill of complaint but in the answers of the defendants, there is sufficient to establish the navigable character of these waters, even if the proof was slight, but the record contains abundant proof that from the earliest times these waters were navigated by multitudinous craft plying the Great Lakes. The answer of the defendant Whiteside contains some additional allegations not found in the other answer with respect to the basin into which the waters of the St. Louis River flow. (See paragraphs 20, 21 and 22.) In these paragraphs there is an attempt to allege the spreading out of the St. Louis River over the great basin that forms the upper part of the head of Lake Superior. Without here quoting at length from these paragraphs, we are content with saying that, contrary to the intent of the defendant therein answering, the topography of the country and the conditions thereof are alleged in a manner which negatives the character of these waters as being those of a stream.

In connection with plaintiff's allegations and the other proofs, let the maps be examined. We assert that there is no point which can be fixed as the mouth of the St. Louis River until the south end of Big Island is reached. The maps prefixed to this brief, prepared by Mr. Patton by uniting certain of the exhibits, make clear our contention. If these waters, at the point here in question between these parties and up to a point above mentioned, constitute a river, then the waters of St. Louis Bay and the Duluth-Superior Bay are just as much those of a river. If it is suggested that the terms used in the constitutional boundary,



which make mention of the St. Louis River, should be applied to this point in question, then we have only again to say that there is no point below Spirit Lake which can be fixed as the mouth of the river, and the constitutional boundary did not go into detail of description. It said "through the St. Louis River and Lake Superior." It only mentions the river and the lake. To call these bays and Spirit Lake a part of Lake Superior does not contradict the constitutional boundary. The mere fact that a current is discernible at times through these waters, or some portion of them, and in certain places in these bays and even in a portion of Lake Superior east of Minnesota Point, does not make them a river.

There is no trouble whatever with the constitutional boundary. It did not locate the mouth of the St. Louis River. It is apparent that there is no reason within the authorities or common sense in claiming the waters below the junction with Spirit Lake or St. Louis Bay to constitute a river. There is far more reason and common sense in claiming that the natural entry between Minnesota and Wisconsin Points is the Nemadji River than there is for claiming that it is any part or parcel of the St. Louis River, but as a matter of fact, it is not a river at all. (See Ex. 3, 5, 9, 11 and 12, shown also upon the compiled maps prefixed to this brief.) The record shows abundant proof to sustain the contention of the plaintiff that the waters in question are in their true character part and parcel of the Great Lakes. It matters not, under the authorities which we submit, by what name they may have been called by any explorer, engineer, or even legislature. What is their true character is the question, and this counsel admit.

Exhibits 3, 4 and 5, the original government land maps, show these waters, and designate them as St. Louis Bay. They have been navigated from the earliest times by the craft plying upon the Great Lakes as well as by local craft. The old trading post was at Fond du Lac (head of the lake.) (See evidence of Alfred Merritt, pages 38-44 and



pages 51 and 52 Transcript.) Mr. Merritt described the various bays and the widening of the shores below Fond du Lac until the greatest width of Lake Superior is reached. He said that the waters from Spirit Lake down did not resemble a river in appearance, but were bays; that Minnesota Point is sand and gravel and Wisconsin Point sand, and that Minnesota Point is so narrow in places that the water has blown through; that the water seeps through these points, and that it is but a few feet down to the water; that he has seen the blue lake water away up into St. Louis Bay when the waters were still,—waters that came in thorough the Superior Entry. (Page 43 of Transcript.)

On cross-examination at page 45-46, when asked if St. Louis Bay and Pokegama Bay were not formed by the St. Louis River, Mr. Merritt said that he did not know how they were formed, but that the St. Louis emptied into the upper part. Asked if they were not formed by the overflow of the river, he answered, "Well, the lake backs up." (Page 46, Transcript.)

Mr. Merritt insisted that there are tides recurring at different intervals during the day in Lake Superior, a rise and fall of about nine inches, and that this variance with the lake was shown in St. Louis Bay and is independent of the great rises caused by winds. (See Pages 44-46, Transcript.)

Mr. Merritt described the island which counsel called in their brief for the first time "Tallas Island," as a little spit of land on the northerly part, and the remainder marsh, with some cedar and black ash on it, such as would grow in wet lands, and that the island was many times covered with water. (See p. 41, Transcript.) He testified that the waters of the bay at the locus in quo are and always have been on a level with Lake Superior, subject to the rise and fall of the lake; that the currents run both ways (See pp. 42-43, Transcript); that he had known the waters of the



lake to rise four feet, showing a rise on the shore of St. Louis Bay to that extent. (End of p. 43, Transcript.)

Albert Swenson has lived nearly all his life on the shores of Spirit Lake; testified to the waters flowing both ways, to the periodical movement of the waters independent of the action of streams, and that he had been floated up by the current clear across Spirit Lake with a loaded craft, and confirmed in every respect Mr. Merritt's testimony as to the character of the waters. He testified as to the island in question, that the growth on it consisted of alders and willows and most of the island was marshy (pp. 56-57 Transcript); he also insisted that there were tides from the lake running up these bays.

John H. Darling, Government Engineer, while stating that he did not believe in Lake Superior tides, properly speaking, as such, showed that these waters at the locus in quo were on a level with the lake; that there is scarcely a perceptible slope; that there is a very slight current which is practically lost in the bays; that the waters set back and flow both ways; that experiments by simultaneous gaugings extending over a considerable period of time showed that the water in its normal condition at Minnesota Point, at New Duluth and at Fond du Lac below the rapids, is on a level, and that a rise of less than three inches in the lake will be felt approximately up to Fond du Lac; testified as to this small horseshoe-shaped island between the lands of plaintiff and defendant; that in the making of the government improvement, which he said was made in betterment of navigation and commerce, this island was cut through and that that portion on the southerly side had since disappeared; that the improvement was the deepening and straightening of the channel by dredging; that the dredging and the deposit of the dredged material had largely filled up the old deep water channel; that there were currents in these waters both eastward and westward, and that the waters of the lake east of Minnesota Point and the waters



above this point in question were on a level; that there is almost a continuous fluctuation of the level of the lake, a rise and fall, and that whenever the lake rises the water sets in through the canal and through the Superior Entry, until the water in the lake falls below the normal level, when it settles down and holds out long enough to draw the water of the bays down to its level; and that there is a movement independent of wind or storm. (See pp. 60 to 68, Transcript.)

Charles A. Pearson, a man exceedingly familiar with these waters, spent much time upon them, a student of geology and geography, testified that there is a fall in the St. Louis River of 700 to 750 feet between Cloquet and Fond du Lac; that there is no perceptible drop between Fond du Lac and the lake east of Minnesota Point; that the waters spread out over the whole valley and look to be an arm of Lake Superior; testified as to the shores, the existence of numerous bays, many of which he had explored, and the various streams running in; that the waters of St. Louis Bay at the locus in quo open out into Spirit Lake at substantially the full width; testified to the mingling of the waters, to the flowing of the waters both ways; testified that there were what might be called tides at fairly regular intervals, but under normal conditions there was no perceptible current in these waters. (pp. 81 to 87 of Transcript.)

These waters then are on a level with the lake and rise and fall with it. Any perceptible rise or fall in the lake east of Minnesota Point is felt in these bays, and the waters flow backwards and forwards with absolutely nothing to separate them from the main body of Lake Superior, except these points of land, by reason of the existence of which local names have been applied to these bays. The existence of these waters does not depend upon the river more than the fact that the river may add slightly to the volume of the water contained in the lake basin. There would be water in these bays whether there was any river there or not; the



action of these waters is not that of a stream, nor do they resemble that of a stream.

Upon these facts shown on the record, upon good sense and sound reason, and upon every principle of law and public policy, as disclosed by the cases already cited and by those which we now ask the court to consider, these waters should be held to be a part of the Great Lakes and governed in all respects by the law applicable thereto.

- Ainsworth v. Munoskong Hunting & Fishing Club*, 159 Mich. 61; 123 N. W. 802;  
*Sherwood v. Comm'r State Land Office*, 113 Mich. 227;  
*People v. Silberwood*, 110 Mich. 103; 32 L. R. A. 694;  
*State v. Fishing & Shooting Club*, 127 Mich. 580;  
*State v. Venice of America Land Co.*, 160 Mich. 680; 125 N. W. R. 770;  
*People v. Featherly*, 12 N. Y. S. 389;  
*Bodi v. Shooting Club*, 57 O. St. 226;  
*Hogg v. Beerman*, 41 O. St. 81;  
*Fletcher v. Phelps*, 28 Vt. 257;  
*Lawton v. Steele*, 119 N. Y. 226;  
*Ne-pee-nauk Club v. Wilson*, 96 Wis. 290; 71 N. W. 661.

*Ainsworth v. Munoskong Hunting & Fishing Club*, *Supra*. Decided December 10, 1909. Published January 7, 1910. We have examined the record and briefs in this case, including the evidence given, upon which the decision was based, and the evidence is not stronger than that in the case at bar, as tending to establish the character of the waters in question as a part of the waters of the Great Lakes. We have also examined the government charts of these waters. The Munoskong case was so framed up as to leave the sole question to be determined whether Munos-



kong Bay was a part of the waters of St. Mary's River or part of the waters of Lake Huron. Munoskong Bay opens into Mud Lake. The waters of two of the channels of the St. Mary's River find their way into Mud Lake and Mud Lake continues down to the broader expanse of water known as Potagannissing Bay. Mud Lake is from one and a half to two and a half miles in width, speaking roundly. All of these waters reach Lake Huron through the Detour Passage. It was held in this case that the names applied to waters by geographers, navigators or even legislatures cannot change the character of the waters. What they are must be determined by their character; that Munoskong Bay is not a part of the St. Mary's River, but a part of Lake Huron and that the title of a riparian owner therefore only went to the shore.

In reaching this determination, much force was given to the fact that the waters are on a level with the lake and rise and fall therewith; that the appearance of a river was gone, the swift flow of the water absent, and that the fact of a current through the waters was not controlling. The fact that it was not a widening of the stream, which again assumed the definite form of a river, was given much force. It was held that the river had lost its character as such at the foot of the Neebish Rapids.

All of the facts considered by the court controlling in this case, as determining whether these waters should properly be called the waters of the river or of the lake, have been established in the case now before the court. An examination of the map will show the full force of the decision as applied to the facts of this case. The river, having struck the level of the lake, spreads out into an expanse of water in which are numerous small islands, and this expanse of water is connected with the lake by a narrow passage, similar to the inlet between Minnesota and Wisconsin Points. The contention of the defeated party in the Munoskong case was that Mud Lake was



St. Mary's River and that Munoskong Bay was an enlargement of the river. The resemblance is striking to the contention of the defendants in this case with reference to St. Louis Bay and Spirit Lake.

*State v. Venice of America Land Co.*, 160 Mich. 680. Decided April 1, 1910.

In this case it was held that the land involved was part of the bed of Lake St. Clair, that the title passed to the state upon its admission into Union, that it is held in trust for the people for the purpose of hunting, fishing, etc., and that the title to submerged land held by the state cannot be divested by adverse possession.

The land in question was the lower part of what is known as Harsen's Island. The upper part of the island had been surveyed and patented. The lower part was boggy, sometimes covered with water, sometimes portions of it out, and in which there was a growth of subaqueous vegetation, and on part of it there was prairie grass. It was unsurveyed and the court held it to pass to the state as a part of the bed of the lake.

*Sherwood v. Comm'r State Land Office, Supra.* This case held that an unsurveyed island known as Sweet's Island, situated 600 feet from the shore and between Detour Passage and St. Joseph's Island, belonged to the state and not to the adjacent land owner; that it belonged to the state as a part of the bed of the waters, and that it was in the waters of Lake Huron. The court generalized the holding in the syllabus so that the same reads "that the fee of an unsurveyed island in one of the Great Lakes, situated several hundred feet distant from the main land, is in the state and not in the riparian owner," and that "an island lying contiguous to the main land of the Upper Peninsula between Detour Passage and St. Joseph's Island, is within the waters of Lake Huron and not in the St. Mary's River."

Detour Passage bears a close resemblance to the Superior Entry between Minnesota and Wisconsin Points.



This case was approved in the *Ainsworth* case and referred to as holding that the waters in question were a part of Lake Huron and not a part of the St. Mary's River, and that the reasons, that must have governed the decision in that case, applied with equal force to Mud Lake and Munoskong Bay.

*People v. Silberwood, Supra.* Holds that the title of the shore owner at the *locus in quo* stops at the shore and upholds the act of the state legislature in setting apart a tract of the lake for public fishing, shooting, etc., so as to preserve the marshes.

*State v. Fishing & Shooting Club, Supra.* In this case the minority opinion of Judge Hooker is the principal opinion and is printed first. The court made by its syllabus his opinion the opinion of the court with respect to the matter of the title to the beds of lakes, etc., but the majority of the court differ from him on a conclusion of fact from the evidence. The minority opinion of Judge Hooker is cited as the opinion of the court with respect to the matters which make up the greater part of it. He held the Flats to be a part of the bed of the lake. It was held that the title cannot be gained by adverse possession of lands held by the state. It is a strong case on the character of the state's title to the beds of lakes, to the effect that the same is sovereign, not proprietary or alienable, and on the question that the title of the owner of lands abutting upon the shore stops at the shore.

Michigan, it should be remembered, is one of the states that, unlike Minnesota, holds that as to navigable streams the title of the abutting owner extends to the thread, applying the common law tidal test of navigability.

*People v. Featherly, Supra.* Sodus Bay, a body of fresh water in Wayne County, about five miles long and three miles wide, which has an opening into Lake Ontario, from which it is separated by a bar about a mile in length, was held to be a part of the lake. Some of the waters in



the bay, it was shown by some of the witnesses, came from Lake Ontario. The opening into it was wide enough for boats to run in. The sand bar between the lake and the bay, one witness thought, was formed by the action of the waters in the lake; that when the wind was in a certain direction the waters in the lake would sometimes wash over the bar and there would be a current setting back in the bay. The channel was sixteen feet deep in which the waters flowed in and out at intervals, and the flow did not altogether depend upon the direction of the wind.

*Hogg v. Beerman, Supra.* The controversy in this case was over land titles, and the question was whether the northern edge of an island and dyke was the shore of Lake Erie, as referred to in a certain grant, so as to include within the grant a certain small harbor. Interpreting the language and terms of the grant, the court held that it was. The grounds upon which the decision rested are not necessary for us specially to consider, but the court said in the course of the decision (referring to Lake Erie) "in one sense, all its bays and harbors are part of the lake."

*Bodi v. Shooting Club, Supra.* In this case the question was whether certain waters were a continuation of Sandusky Bay or were waters of the Sandusky River and Mud Creek. The trial court found that they were the latter. Appeal was taken to the Supreme Court. The attorney for the plaintiff in error, in discussing various definitions of a river, claimed that the Sandusky River has no banks after passing through the marsh and emptying into Mud Creek near Squaw Island, and that between Squaw Island and Sandusky Bay, where the channel continues through Mud Creek Bay, there are no banks above water; that the waters of Mud Creek rise and fall with the waters of Sandusky Bay, which rise and fall with the waters of Lake Erie. He contended that the state held the title to the bed. The attorneys for the defendant in error claimed that Mud Creek Bay and the broad expanse of Sandusky River an-



swer all the requirements of the definition of a river; that they are streams of water flowing in a particular direction and in regular channels, between banks; that the fact that they spread out over a great expanse of low land and overrun their channel banks is of no significance. He likewise claimed that it was of no significance that the waters rose and fell with the waters of Sandusky Bay. *The court held that the waters in dispute formed part of the bay and not part of Sandusky River and Mud Creek.*

*Fletcher v. Phelps, Supra.* The dispute in this case was over the boundary to a tract of land abutting on a pond and a creek, and the question arose as to whether a different rule applied in determining the extent of the land where it abutted on the pond and on the creek. There is a small rivulet or stream which passes through the center of this low land and the lake, when it is not overflowed, the bed of which is distinguishable by being somewhat lower than the rest of the low land. At low water in the lake, the stream is limited to this channel, and is to some extent supplied with water from inland springs. The court gave the same effect to the grant of land involved, where it abutted on the so-called creek, as it did to that which was admitted to be upon a pond, and said that at times of high water in the lake this creek appears to be little more than an arm or inlet of the lake itself, and the rise and fall of the water in the creek depends upon the rise and fall of the water in the lake.

These waters, then, being part of Lake Superior, the Wisconsin doctrine as applied to lakes and ponds, including the Great Lakes, should apply here, and in no event in such a case could the shore owner, or owner of land abutting thereon, in that state, have any kind of a title beyond the shore, but he would have the usual riparian rights, subject to the rights of the public, precisely the same as he would have in Minnesota, and precisely the same as he would have in Michigan.



In *McLennan v. Prentice*, 85 Wis. 427, involving a tract of land on Chequamegon Bay, the court held that the lands lying in the shallow waters of the Great Lake, and between the bank and the navigable water, are held by the state in trust for public purposes of navigation and fishing, and no grant thereof for any private purpose can operate to impair or defeat the previously accrued rights of the riparian owner. The title of the state is a sovereign title and it cannot abdicate its trust.

In *Ne-pee-Nauk Club v. Wilson, Supra*, the question in controversy was the title to lands under Mud Lake, and whether the state owned them, or whether the plaintiff owned them by virtue of riparian ownership, and the question depended, the court said, on whether Mud Lake is a meandered lake or a water course. It was from 35 to 65 rods wide and three miles long. In the spring and fall the whole surface was covered with water. In summer, much of the water disappeared. It was navigable by small craft, such as canoes and hunting skiffs. It was formed by the expansion and dispersion of the waters of a small stream called Grand River. After Grand River comes into and becomes Mud Lake it follows no definite channel. The court said:

"It is said that the controlling distinction between a stream and a lake or pond is that in the one case the water has a natural motion,—a current,—while in the other the water is, in its natural state, substantially at rest, and this entirely irrespective of the size of the one or the other. But not every sheet of water in which there is a current from its head towards its outlet is therefore a stream," (Citing Angell on Water Courses, 6 Ed. Sec. 4 f.) "It is said that even the large lakes have such a current."

The court held the body of water to be a lake and the title to the bed thereof to be in the State of Wisconsin and the title of the shore owner to stop at the shore.



We have already shown that in the State of Minnesota there is no distinction made between navigable lakes and streams. None ought to be made. In practical effect none is made in Wisconsin, although that state has present to harass the court the old cancer of the fiction of some sort of a title in the bed, growing out of the old common law doctrine of tide waters, adopted in the 2nd Wisconsin, and long since held inapplicable both by the state court and by the Supreme Court of the United States. When navigability in fact has been substituted for the ebb and flow of the tide as a test of navigability, there is no longer any proper ground for a distinction between navigable lakes and navigable streams. This we have before fully discussed, but if these waters are held by the court under these authorities and upon this record to be a part of Lake Superior, then there is no question whatever as to the doctrine of the state of Wisconsin. See also *Priewe v. Improvement Co.*, 93 Wis. 534, 103 Wis. 537, and *Diedrich v. N. W. U. Ry. Co.*, 42 Wis. 248, *supra*.

Counsel have endeavored to refine away the force and effect of these cases, and to draw distinguishing comparisons, but we contend that natural facts and conditions cannot be changed by arguments and that the controlling facts in all of these cases appear here in this record in even greater degree. Counsel have claimed that Mr. Darling testified to a well defined channel and have given definitions of a river to show that a channel is a characteristic of a river. Mr. Darling said that there had been a channel caused by the scouring action of the water current, especially in times of flood; that it is usually limited to flood periods; that the old maps show a channel which dies out and disappears in the broad expanse of St. Louis Bay, and that there is a stretch where there is no channel at all. He also testified to there being such a channel in Superior Bay; that there was a current both ways through the natural entry and through the canal. (Page 75 of Transcript.)



We submit that this evidence does not tend to establish a river channel, nor to establish that either these bays or arms of Lake Superior constitute a river; neither does the effort of counsel in cross-examination to show the existence of a current and slope to the waters from Fond du Lac to the Atlantic Ocean tend to establish that fact. Neither currents, nor such channels as witness was defining, tend to prove St. Louis Bay a river.

In several of the cases cited by us, a current was discernible clear through the lake, and in the Wisconsin case of *Ne-Pee-Nauk Club*, 96 Wis. 290, the lake was but a small, shallow body of water created by the expansion and dispersion of the water of the stream. Finally, and apparently principally, counsel fall back upon the claim that by Congressional declaration this body of water is the St. Louis River. This declaration, they contend, is embraced in the constitutional boundary by the reference to Nicollet's map. They also claim that the language used as applied to the lake is "middle of Lake Superior," but as applied to the river it is "up the main channel of said river," and they argue that therefore the boundary line is in the actual middle of the lake, but as applied to the river it must follow the thread of deepest water, as the intentment of the Act. This is refinement with variations. In the first place Congress did not refine in detail these waters nor was that its purpose. It referred to Nicollet's map, it is true, and Nicollet's map showed the river and showed the main lake and did not show these bays. Nicollet's map was not primarily a map of these waters nor did it give them in detail. It was a map of the upper Mississippi basin. The exhibit is a section of it. The line ran through the lake and through the river to the first rapids above the Indian Village, and thence south to the St. Croix River, etc., and the Act said it was according to Nicollet's map. The map, in view of the large country embraced in it, was on a small scale. It was probably the only map of the region available. It is straining it a good deal to say that by that



reference the character of these waters is fixed as a river. If counsel stick to the middle of the lake, and stick to their ten-mile-wide west-end of the lake, as they have sometimes described it, they can never reach the St. Louis River, but if they follow on as near as may be through the middle of Lake Superior, including these bays, they can reach the river. They draw a distinction in the description of this boundary line in the lake and river, and yet must immediately depart from it in order to get anywhere. So far as appears from Nicollet's map, one might go perhaps right from the middle of Lake Superior into the St. Louis River, but it cannot be done, and counsel must vary from that map in order to get out of what they are willing to call Lake Superior; yet they insist that because of the reference to that map, there must be a broad ended lake, and this river flowing into the middle of it, whether it is so or not. Still applying the term in an elastic way, they wish to modify it so as to reach the deepest water, yet when the government in the exercise of the power known by the states and by all to have been reserved in it to improve the ship way, has improved it in the actual middle of these waters, they no longer want to go in the middle, but claim to own the whole channel, and consequently to have the right to exclude the opposite shore owner from access thereto.

In the case of *Louisiana v. Mississippi*, 202 U. S. 1, much relied on by counsel, the constitutional boundary ran down the Mississippi River to the River Iberville, and thence along the middle of said river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico, but to get to the gulf this boundary had to be interpreted to run through the Rigolets and through Lake Borgne, else it could not have been carried to the gulf at all. Constitutional boundary descriptions such as this are general, and often have to be determined, construed and applied, the intendment sought and a solution arrived at that will do justice to both commonwealths and the citizens thereof, in obedience to the controlling prin-



ciple as laid down in the cases from which we have fully quoted, viz., that neither of the states nor the citizens thereof shall be deprived of their access to the actually navigable and navigated water.

We submit, therefore, that the lands of these parties border upon the bay, an arm of the Great Lake, and that their ownership never extended further than the shore with incidental riparian rights; that the title to the bed is in the states in sovereign capacity, as an inalienable trust, and that whatever rights the shore owners have depended upon the ownership of the shore or bank and not of the bed; that no private ownership can grow upon the bed; that the middle line which counsel are anxious to apply to the lake applies here, and there is no occasion for its location anywhere else.

In this connection we may as well consider what effect, if any, the case of *Louisiana v. Mississippi* has upon the issues of this case, for counsel claim that by reason of that case they do not need to rely upon the claim that this is a river and not an arm of the sea. They say that the doctrine of the *thalweg* is made by this case to apply to such arms and bays the same as to rivers. We do not believe counsel for appellee would be willing to stand on that proposition alone in this case. The effect which they seek to obtain from it is that the interstate boundary would run north of the little island and not through the actual middle of the bay, and that there it must remain, and that their riparian rights extend to that line. We do not think such effect is to be given it, nor that it tends to support the claim of ownership of the island, nor to support the claim that anybody else could ever obtain title to the island. *The island was not there when the constitutional boundary was established by law, nor does it appear where then was the deepest water.* The island arose afterwards upon a bed belonging to the state. The controversy in the *Louisiana-Mississippi* case was instigated by reason of conflicting claims to



islands in the Mississippi Sound, arising by apparent conflict in the constitutional boundaries of the two states, and instigated by the control which each state sought to exercise over the oyster industry. To fix that boundary the boundary had to be run from the Mississippi River to the gulf. The court examined much evidence and many maps, considered many facts and sought for the intendment of Congress, and, applying the purpose of running a line through these waters to the gulf, and in order to give effect to the boundary line, the court made it follow the ship way through the Rigolets and through Lake Borgne and through Mississippi Sound, none of which had been mentioned in the boundary at all, and established the same as running through the inlet or pass between Cat Island and Isle a' Pitre to the Gulf of Mexico. This was the most practical way, and to the court, as it appeared, a just way, to settle that boundary.

As to the doctrine of the *thalweg*, the court, after quoting Mr. Justice Field's decision in the case of *Iowa v. Illinois*, said:

"This judgment related to navigable rivers. But we are of opinion that, *on occasion*, the principle of the *thalweg* is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries, and others arms of the sea.

As to boundary lakes and land locked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different states; but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the *thalweg* applies." (Italics our own.)

It is clear enough that in general application the *thalweg* doctrine applies only to rivers, but *on occasion*, such as existed in that case, in order to give effect to the purpose of making waters an interstate boundary, the court has



applied the doctrine. The cases are rare, the *Louisiana* case being practically the only one, we think. But here in the case at bar, the court, without evidence as to conditions at the date of the Congressional enactment, is asked to apply that doctrine for the purpose of destroying the very purpose for which the courts on occasion invoke it. They seek to apply it here where no occasion exists.

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## VI.

### The Small Island.

**The Presence of the Small Island, or the Remnant Thereof, is Not a Controlling Element in This Controversy. No Title Can be Obtained to it by Possession or Otherwise. The Title to it is in the State in Inalienable Trust, the Same as the Rest of the Bed, in Sovereign Capacity. The Case is no Different Than Though It Was All Open Water.**

This is the view the Government took of it when it improved the channel and scooped out a great part of the island, after which much of the rest of it disappeared. Had this island been in existence at the time the Government surveyed and platted the lands, the Government might have surveyed it and it then would have been public land, subject to public disposal. If it had been in existence, small and inconsiderable in extent, and the Government had not seen fit to survey it, and it had been shown on the Government plats or field notes of the lands adjoining the shore which it granted, then it might be said, in the absence of fraud in the survey, that the Government evinced no intention to retain ownership of it. The title would go to the state with the rest of the bed. In such case the adjacent shore owner might claim dominion over it to wharf out over it or use it in his improvements to reach navigable water. In such case we do not doubt the power of the Government to use it or remove it in making improvements in aid of navigation. Being out from the shore and not joined to it,



we apprehend the Government could do this without the payment of compensation to any shore owner, under such cases as *Scranton v. Wheeler*, 179 U. S. 141. Where the Government leaves such an island unsurveyed, it cannot afterwards survey it and grant it in separate ownership, after it has granted all the shore lands, for the title has already passed with the bed to the state. As the state took nothing in proprietary right and could convey nothing except rights in aid of navigation, it would have no different title or dominion as to the island than it holds over the residue of the bed of the waters. Only in case of the island being surveyed and passing to the state by some grant, as for instance the swamp land grant, would the state gain any proprietary interest in it.

We believe the above to state accurately the law on the subject applicable to this case. Neither do we deny that under the doctrine of some states consistently adhered to, an unsurveyed island in a stream may be so situated as to be held to pass with the ownership of the shore as a negligible quantity. *Lattig v. Scott*, 17 Ida. 506; 107 Pac. 47. Perhaps it might be said in some of these cases that it was the intent to make the shore of the island the real shore. We have no occasion to combat cases, which hold that the Government in either case cannot go and make a subsequent survey and grant of such islands separately, in the absence of fraud in the first survey.

*Rossmiller v. State*, 114 Wis. 169;

*Hobart v. Hall*, 174 Fed. 433; Appeal 186 Fed. 426;

*Sherwood vs. Commissioners*, 113 Mich. 227;

*State vs. Fishing Club*, 127 Mich. 580;

*State vs. Venice of America Land Co.*, 160 Mich. 680.

Many other of the cases which we have reviewed might be here cited, but it is unnecessary to repeat. Counsel for



appellee on the argument below was asked whether he would make the same claim of right to intervene between the plaintiff and the navigable channel in the absence of an island, and he answered that he would. No other answer could fairly or logically have been made, for appellee claimed he owned the bed in fee, and that this island belonged to him because he claimed it grew upon his bed, which he claimed was on the Wisconsin side of the interstate boundary. Of course, all of this claim on the part of the appellee is based upon the contention that this is a stream. We contend that it has been incontrovertibly established that this is an arm of the lake, and that all of the Wisconsin decisions on the subject of ownership upon the shores of inland lakes and arms of the Great Lakes are applicable rather than cases relating to streams.

McLennan v. Prentice, 85 Wis. 427;

Diedrich v. N. W. U. Ry. Co., 42 Wis. 248;

Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214;

Priewe v. Wisconsin Land & Improvement Co., 93 Wis., 534;

Illinois Central Ry. Co. v. Illinois, 146 U. S. 387.

In the case of *Franzini v. Layland*, 120 Wis. 72, the court held that unsurveyed islands in navigable streams in that state are presumed to be appurtenant to the surveyed land nearby, within the limits of which they fall, as regards riparian rights, and nothing appearing to the contrary, the same are presumed to pass with the conveyance of the submerged land to which it is so appurtenant. But the facts admitted in the pleadings show that the island here involved was not in existence when the lands on the shore were surveyed and conveyed by the Government. It grew upon the bed. It seems axiomatic that no greater title could accrue, under any kind of construction, to a parcel of land thus rearing itself above the water's level, than the



claimant had thereto while it was submerged. As the grant of lands by the Government in either of the states—Wisconsin or Minnesota—stopped at the waters' edge, no title thereto by state concession of a bed in the State of Wisconsin, even if this be held to be in the stream, is of such a proprietary character as to carry the title to a subsequently formed island thereon.

In the case of *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. Rep. 855, and on application for a rehearing, 85 N. W. Rep. 402, there was involved a controversy over what is known as Jones Island. The record was not very satisfactory to the court. The action was ejectment. The answer pleaded the statute of limitations. The evidence on the part of the defendant was to the effect that in 1872, theretofore and thereafter, except as artificially changed, the territory called Jones Island, which includes the premises in controversy, was covered by the waters of Lake Michigan, or an arm of the lake partaking of its character, or by some expanse of water governed by the law relating to the title to beds of lakes and ponds, and that the premises were formerly a part of such submerged lands. A man by the name of Truker, at the time specifically stated, had a house upon the submerged territory, supported in some way in the shallowest part, resting on a piece of made land. He pretended to exercise dominion over the territory and prevented any person from locating thereon without his permission. He sold his house and claim of title to Jacob Muza in 1872, making no paper transfer of the property however. There were then several settlers on the island. Muza took possession, such as was possible under the circumstances, and thereafter asserted dominion over the same in the same manner as his predecessor had done. There was testimony showing that the entire territory was covered with water in 1855. The record was made exhibiting a patent either from the United States or from the state, which it was claimed included this submerged land or some portion of it. Justice Marshall, in deciding the case, said:



"Now, if such indicated facts are the truth of the matter, the land belongs to the state of Wisconsin regardless of whether the United States or the state has in form transferred it to private ownership. The law in that regard is too well settled to warrant any discussion of it here. This court has been over the whole subject many times in recent years. The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law. A patent from the United States, so far as it purports to cover any of such lands, whether made before the state was admitted into the Union or thereafter, is ineffectual. It has been so repeatedly held. A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary high water mark. The United States never had title, in the Northwest Territory, out of which this state was carved, to the beds of lakes, ponds and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. Whatever concession the state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors. Under that, by long established judicial policy, which has become a rule of property, a qualified title to submerged lands of rivers navigable in fact has been conceded to the owners of the shores, otherwise the title to lands under all public waters is in the state, and it is powerless to change it. It cannot transfer such title by grant or otherwise, nor can title thereto be obtained by adverse possession \* \* \* No private ownership has been conceded which displaces or materially affects such public rights. As to them, the state has not and cannot abdicate its trust.



There is no need of enlarging on this matter. As before indicated, this court has in recent years several times declared the law as here stated, grounding such declaration upon indisputable principles and the law as laid down on the subject by the Supreme Court of the United States."

Citing:

McLennan v. Prentice, 85 Wis. 427,  
Willow River Club v. Wade, 100 Wis. 86,  
and other Wisconsin cases, and  
Railroad Co. v. Schurmeier, 7 Wall. 272,  
Illinois Cent. Ry. Co. v. Illinois, 146 U. S. 387,  
Yates v. Milwaukee, 10 Wall. 497.

This case is a direct authority, as we understand it, both upon the proposition that the title to a subsequently accrued island would vest in the state, or rather remain vested in the state where it had been while the land was submerged, and, further, that no rights could be acquired thereto by a squatter thereon, and, especially taken into consideration with the decisions which we have before reviewed, we think the case must be said to so decide whether streams or lakes are involved, and that under this authority no ownership in such an island could be claimed by a riparian owner in either state beyond his ordinary riparian rights. Not even the fiction of qualified title by state concession has any application to islands in the lakes.

If these are the waters of the Great Lake, or an arm, bay or inlet thereof, whether the island was in existence when the survey was made or grew subsequently thereto, the title would be vested in the state as the rest of the bed. No different title could accrue by its rearing itself above the surface of the water than existed before. The authorities in the state of Michigan as to such islands here become applicable and of enhanced force in view of the Michigan doctrine as to streams.



Sherwood v. Comm'r State Land Office, 113 Mich. 227;

Olds v. Comm'r State Land Office, 150 Mich. 134; 112 N. W. Rep. 952;

People v. Warner, 116 Mich. 228; 74 N. W. 705,

and other cases cited under the preceding subdivision.

The case of *St. Louis v. Rutz, Supra*, is not here controlling for, in that case the decision rested clearly, so far as relates to the point here in controversy, on the ground that in the state of Illinois the state had conferred the title in fee upon the riparian owner to the bed of the stream, and that if he owned the title in fee to the bed, then he owned an island which formed thereon. We contend that no shore proprietor in the state of Wisconsin owns any such title to the bed of such a stream.

It follows, then, from the foregoing authorities that neither the defendant Tallas nor any other squatter can acquire any ownership to such an island by squatting upon it and claiming continued possession of it. He could not obtain it from the government, for the government does not own it. He cannot get it from the state for the state has no proprietary ownership to part with. He can get no title by prescription against the government. He cannot get it by divesting Whiteside, for neither Whiteside nor his predecessor ever owned it. No public land could accrue upon the bed, for the title had gone to the state in sovereign character. No private estate could grow upon the sovereign estate. The title is with the bed as a part of it and must remain there. The government lawfully scooped out most of it. Tallas was no longer between Whiteside and the deepest navigable water. The parcel of the island left remaining on that side disappeared, as the uncontradicted evidence showed. Tallas' cabin burned. He afterwards



reconstructed it in another place and it may be supposed that he hopes to acquire the whole reef of land between the plaintiff's land and the navigable water. Whether such obstruction might ripen by lapse of time into a right to continue the same indefinitely we do not admit, but the same may be a matter of some doubt. It is no different, in our view, than though Tallas should go into the shallow water and construct his house upon pegs, as the original one was constructed on the low, marshy land, and reach the same by boat as his cabin is now reached.

Nor is Whiteside's claim any better than though he set up his claim to the bed under the water at that point. There is no title in fee in Whiteside and none awaiting Tallas's acquisition by prescription. The action is timely brought by the plaintiff, and we submit the plaintiff had a right to have an adjudication by the court as to all of the parties.

In the case of *Whittaker v. McBride*, 197 U. S. 510, 49 L. Ed. 857, the court refused to recognize any rights in a squatter or settler who undertook to gain rights in an island in the Platte River. The island had at one time been submerged. It was twenty-two acres in extent. The opposite shore owners had contended for it. The Nebraska court ran the filum aquae of the river through it and divided it between them and put the squatter out, and the Supreme Court of the United States sustained it on the theory that the contention had been determined according to local law.

In *Menominee River Lbr. Co. vs. Seidl*, 149 Wis. 316; 135 N. W. 854, it was held that an island in the bed of Green Bay caused by dredging material being thrown up, did not become the property of the riparian proprietor, through the filling up of the space between this artificial island and the main land, either by accretion or by artificial means, and that likewise an island, that rears its head by natural causes on the bed of such waters, becomes the



property of the state which owns the bed, and not that of the shore owner.

The action being to recover title and possession, the court held plaintiff could not have his riparian rights adjudicated in such an action. This case is both an authority that none of these parties own this island, and also that it could not have been recovered by Norton in ejectment. Thus the action was properly brought against Tallas as well as the other defendants and his possessory rights should have been determined.

In *State v. Fishing Club*, 127 Mich. 580, hereinbefore referred to, the court said that title cannot be gained by adverse possession of lands owned by the state.

We think the Court of Appeals erred in treating this case in a measure as one to try title to this island, and in magnifying its importance.

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## VII.

### **The Government Improvement and the Right of Access.**

Under this head we mention a few of the contentions of appellee in their brief before the Circuit Court of Appeals, which may be repeated here, and which we do not wish to leave unchallenged.

The arguments that we are seeking access to another channel, and that we are seeking to take property belonging to respondent, beg the whole question. The argument that we have the same access to the deep waterway through these waters that we formerly had is not founded on the facts. The argument that we are endeavoring to recoup a loss at the expense of respondent is specious, and the statement that we still have all the advantages of a deeper channel of water than the improved shipway is misleading. The improvement in these waters was not in the nature of an artificial channel or a new channel working a diversion of



the waters and commerce from the old channel. On the contrary, right through the middle of this channel or body of water, the government deepened and improved the navigable course. Ships no longer have to wind back and forth like the tacking of a yacht, seeking to follow the deepest places, but may keep on a steady course, which crosses and recrosses the crooked path they would formerly have been obliged to take through this middle. The government improved the channel,—improved the middle of the channel. The appellee is more benefited than anybody else. He knows now where the deep channel is, and, skirting along or around the entire body of his land, as it does, this shipway may be reached from his premises all the way in front of them, and in the main at a regular distance, and by much less wharving or dredging than before. The appellant has to go further in some places to reach this navigable water, but the distance is more regular, and, as in the case of appellee, not only is general navigation improved, but navigation and commerce in connection with these lands. Appellee, in fact rejoicing at his own improved condition, under the guise of a feigned grievance, seeks to destroy the appellant's enjoyment of riparian privileges, by asserting his ownership of a fee title on the Minnesota side of the middle of this bay of Lake Superior, to what was subaqueous land, held always and now in sovereign capacity by the state. Suppose a few years hence, which is not unlikely, commerce on these waters will expand to such an extent that the government will deepen the bed of these entire bays clear up to the shores; what will become of the appellee's claim of fee ownership in the bed and in this speck of a marshy island?

These waters were required by the Ordinance of 1787 providing for the government of the Northwest Territory in accordance with the cession thereof, to be and remain public highways forever. The public generally and citizens of each state are not to be deprived of the benefits of such highway. The government did not reserve the power to



improve this highway solely for the benefit of the owner of Big Island.

The chart, Exhibit "9," shows the dredging material deposited along on the north side of the improved highway, and the chart and the evidence show that the government closed the old deep way for the protection of the improvement, and shrubbery has grown on the embankment. There are three soundings in what was a deep hole north of this reef. Asked about them, Engineer Darling said they were old soundings made before the government improvement and they put them on the chart. A small boat could run its nose in there, perhaps, yet counsel have argued to the court that appellant has a finer channel than the improved one, and that we have all the access to navigable water we are entitled to, as embraced in our riparian rights. The filling has been poured over the prong of the original island and its form has become obliterated. The next sounding east of the three in question is four feet and the next one west is five feet in depth. Even the deep hole cannot be reached by any kind of a boat without going across the shoal water within the zone of riparian rights of other owners.

See Exhibit "9."

Also testimony of G. A. Taylor, pp. 77-80;

Testimony John H. Darling, pp. 62 et seq.

Testimony W. E. Richardson, pp. 96, 97 and 100.

Mr. Darling testified to those soundings being old soundings, that the dredging had largely filled up the whole channel and that it was not deemed expedient to keep it open. Mr. Richardson, who has charge of this property and has visited it frequently over a course of years, testified that there had been filling on both sides of the easterly end of the original island, and the prong was widened. At the



westerly end the whole channel was filled up entirely and the residue is about half the depth it formerly was. The island was useable for no valuable purpose except in connection with the shore, and the reef and island intervened between the plaintiff's land and the navigable water.

As to the right of access all the cases reviewed in Subdivision IV hereof are decisive. Another somewhat unworthy argument is the suggestion frequently made that these improvements are made just where some engineer chooses to dig. The full power was reserved in the government. That power is exercised by Congressional authority. The work is placed in charge of the War Department. A commission of expert government engineers examines the premises and makes reports and recommendations. The documents concerning these are all government public documents. A chart of the proposed improvement is made, certified and approved by the Secretary of War. The Rivers and Harbors Committee inspect the work, appropriations are made for it, and the improvement is carried on by the department of government in which Congress has placed it, and when the process is through it is about as completely authoritative governmental action as it is possible to have.

Counsel say, "There will have to be many small channels connecting with the main artery." Doubtless, but whether we seek to build a wharf or construct a connecting channel, they will come forth and claim that we cannot do it without paying tribute to them. We want the question settled before improvements are begun.

If the purpose of making these waters boundary waters, and preserving the same as a public highway, and reserving the rights of improvement and control in the general government, and vesting the title to the bed in the states, is carried out and not defeated, then the appellant has the right of access to the actual navigable waters in the middle of this bay, without buying that right from the



Wisconsin shore owner, or being forever compelled to pay taxes in two states thereon.

The learned Judge who wrote the opinion for the Circuit Court of Appeals concluded that the mouth of Saint Louis river should be moved down to the narrows at Grassy Point, and gave no effect whatever to these cases, and accorded no force to the controlling facts on the record, which under these cases stamp these waters as those of an arm or bay of the Great Lake. Great stress was laid by counsel and by the learned Judge upon Nicollet's map, for that map showed a stream flowing into a smooth and regular end of the lake, but notwithstanding, the court compromised on a point half way up the bay. A glance at the government land survey map in the record and reproduced in front of this brief should assist this court to arrive at a more correct conclusion.

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### VIII.

#### Jurisdiction.

The learned Circuit Court of Appeals held jurisdiction, but cast some doubt upon the question. Unless we concede all the premises counsel for defendant Whiteside (appellee) have laid down, and we concede none of them, there is nothing in the jurisdictional question.

The locus in quo is in the waters of Lake Superior or an arm thereof; it is on the Minnesota side of the middle of the navigable and navigated channel in this bay as it has existed some years before the action was brought, and on the Minnesota side of the middle of the bay. There exists no reason or cause to claim it to be elsewhere.

We claim also that if these are waters of a stream and not of the lake, still the court had jurisdiction, and that too without regard to where the interstate line may be located through these waters.



There is no dispute between these shore owners as to their ownership and possession of their respective shore lands.

The appellant (plaintiff) does not claim to own the title to the bed of these waters, nor to that parcel of the bed that grew out of the water called the little island. The appellant claims only riparian rights incident to his shore ownership, and claims that within such rights he is entitled to improve and reclaim in aid of navigation, and for the purposes of enjoying access from his shore property to the navigable and navigated channel through these waters out to the established dock line, and that such right of use extends over the island and the reef. The defendant disputes not his ownership of the shore or that he has riparian rights, but disputes the extent of them. The plaintiff is a resident of Kentucky and defendant of Minnesota, but jurisdiction does not depend upon the diversity of citizenship. The cause arises under the constitution and laws of the United States.

The plaintiff brought this suit to have the extent of his riparian rights determined and to restrain the defendant from interference therewith. *Sullivan Timber Co. vs. City of Mobile*, 110 Fed., 186, is a case where the City of Mobile claimed to own the soil under the Mobile River and plaintiff owned the shore land, and in the exercise of his riparian rights had wharfed out to the navigable water. The court on page 197 said:

"The title of the owner of the up'rops at the high-water mark. Such owner is a riparian owner or proprietor, and possesses rights incident to such ownership. Such rights are access to the navigable water on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public." Citing:



Illinois Central Ry. Co. v. Illinois, 146 U. S. 387.

Yates v. City of Milwaukee, 10 Wall. 497.

Webber v. Commissioners, 18 Wall. 64.

Gould on Waters, Sec. 148.

On page 199 the court said:

"There is equity in the bill, in that it seeks to protect the complainant's property or proprietary rights as a riparian owner from invasion or impairment, and to settle and quiet the exercise and enjoyment of the same."

The plaintiff's lands are in the District of Minnesota. All of the defendants reside in that District. There is no question as to the amount involved being more than required for jurisdiction, but jurisdiction did not depend on these facts alone. Under numerous decisions of this court this cause arose under the laws and constitution of the United States. Upon the record of this cause and the authority upon which we submit it, it is confidently asserted that the trial court rightly held that it had jurisdiction. If the Federal Court of that district had not jurisdiction we do not think we can find a court that has.

The counsel for appellee Whiteside frankly conceded in the court below, as he should, to be consistent, that the rights of Whiteside would be just the same whether this island were there or not, and that he could intervene between us and the deep water and keep us out just the same. We concede if he can do it in one case he can in the other.

In the Circuit Court of Appeals, however, a disposition was manifested to put more stress upon the island, and the court seems to have been impressed with the idea that this suit is to determine the ownership and recover possession of a tract of land. We had not so regarded it. That court said in the opinion (p. 149, Transcript) that this island is a



distinct body of land and forms the subject matter of this controversy.

The case of *Menominee River Lbr. Co. v. Seidl, Supra*, holds that such an island is not subject to recovery in ejectment. The question was one of riparian rights which could not be adjudicated in such form of action.

The decision of the Court of Appeals rests upon what we deem to be a narrow and technical view of the cause, the important questions involved having received scanty attention. To say that a state line established at a certain place cannot be changed by act of Congress or by either state alone and that private ownership in land in one state does not extend beyond the state line, is but an elementary statement. To treat such a statement as so determinative of this controversy that plaintiff's bill should be dismissed does violence to the record and avoids the determination of the questions which we urge are controlling in this cause.

Is there anything to justify fixing the location of this submerged interstate line other than through the middle of this bay?

Is there any reason to place it other than between these dock lines through the improved fair way?

Is there any reason upon this record to say that these waters at the locus in quo are other than those of an arm or bay of the Great Lake?

Is there, can there be, any private title to the bed?

Is not the bay or channel the boundary, the practical boundary?

Is not the very purpose of making these waters a highway and retaining power over them,—power to improve them in aid of navigation,—to preserve the public interest, to protect the right of access from the respective shores, and preserve to the citizens of each state and to each state the benefits of access to and enjoyment of the navigable and navigated portions of these waters?



Was it not in part to avoid just what is sought to be done by appellee in this instance?

Does not what appellee desires the court to hold, and does not the decision of the Circuit Court of Appeals, defeat the very purpose of the reservation of this power by the general government?

Does the location of this submerged boundary line between sovereign ownerships in the bed cut off the right of access by shore owners to the navigable water, and to the fair way through this channel as improved by Federal reserved authority?

If no private title is held in these beds why must the boundary of an upland owner's estate be synonymous with the line of that which is held in sovereign capacity?

Upon this record and under the authorities cited, is this island held in any different way than the rest of the bed?

Why should anybody be allowed to get a title to it, simply because a spot of the bed has appeared out of water?

The title of these land owners was not derived from the state but from the general government. Neither that government nor either state has ever recognized any private ownership of title to this spot.

If there can be no such ownership, if the title is in the state, or states, how can Tallas or any other squatter gain a title to it by squatting upon it, and saying he claims to own and is in possession? How can he divest the state's title? Will any number of years of such occupancy be of any more effect than a single year?

Is the public interest of no consequence in this matter? Is it not an obviously just and wise conclusion of the whole matter to leave the boundary to run through the middle, in which case it will run through the channel as improved? That would leave everybody in either state, including the shore owners, with the full enjoyment of all their rights,



without any controversy on their hands, and with the privilege of minding their own business. If not this, then is there any reason to cut off a shore owner from access to the navigable part of these waters, without regard to the location of such boundary in the bed?

We maintain that this piece of the bed which has reared itself into an island is no more obstructive to such access and enjoyment than though it had not appeared, or than it will be when it again becomes submerged, or, as the part south of the channel has already done, moves away. It is within the zone of plaintiff's riparian rights. It is no different than so much shoal water. We submit that the learned court did not properly decide this cause and erred in not affirming the decree of the lower court as to White-side.

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### IX.

#### As to the Dismissal of the Bill as Against Defendant Tallas.

The trial court, although if sitting as a court of law would have decided against Tallas, dismissed the bill as to him and relegated us to the law side of the court to try the same thing over to the same judge. The appellate court sustained this part of the trial court's determination. Naturally, since that court took the view of the case which it did.

We may be wrong. We ought to be, as two eminent courts have held against us. This court will doubtless say at once whether we are, and will not care for discussion of the matter.

Rule 23 of the Rules of Equity promulgated in 1912 gives some encouragement for submitting a few statements.

The plaintiff (appellant here) being the owner and in possession of the Minnesota shore lands brought this suit



in equity to have his riparian rights determined, and to have it adjudged that he had the right, as incidental to the shore ownership, to reach out in front of his property to the dock line, to have access to the navigable improved deep water channel in front of his premises, and claimed that he was obstructed in such enjoyment by the defendants, and that the defendants' claim of right so to obstruct the enjoyment of his riparian rights, if persisted in and sustained, would operate to place the defendants and their ownership between the plaintiff and his estate and the navigable channel through said waters, and depreciate the value of his estate and deprive him of his rights and privileges appurtenant thereto, which he alleged constituted the greater part of the value of his estate, and that the occupancy of defendant Tallas and the claims of the several defendants worked a cloud upon the plaintiff's title and estate.

The defendants answered on the merits separately and by separate counsel. A special examiner was appointed to take the testimony. The defendant Tallas asked for affirmative relief although he did not file a cross bill. A number of days were consumed in the taking of evidence. Counsel for the plaintiff and for the several defendants appeared throughout, counsel for defendant Tallas participating in the examination of witnesses. Stipulations were made as to certain facts and as to the receipt in evidence of documents, both in behalf of plaintiff and defendants, and for the setting down of the case for trial. (See pages 127 and 38 of the Transcript.) On the hearing before the master or special examiner, counsel for the defendant Tallas against the objection of the plaintiff proved by the said defendant, by answers given in monosyllables, that at the time of the beginning of this suit he was living on the island, claiming exclusive possession and ownership of it. No proof of title or of ownership was tendered, and under the law it is clear that no ownership of the island could have ever been acquired. Upon the report of the examiner the cause came on for



argument before the court, pursuant to the stipulation on page 32 and the order of the court made thereon at the top of page 33 of the Transcript. When the case came on for argument and was called, counsel for the defendant Tallas entered an objection to the jurisdiction of the court sitting in equity on the ground that in view of the pleadings and proof it appeared that Tallas was in possession, claiming the ownership of the island, and that jurisdiction was barred by Section 723, R. S. of U. S., and by the seventh amendment to the Constitution of the United States, because plaintiff has adequate remedy at law by ejectment, and moved that the court dismiss the bill as to the defendant Tallas upon said grounds. (See top of page 34 of Transcript.) The cause then proceeded to argument upon the merits, counsel for defendant Tallas occupying in the argument a considerable portion of three days. (See page 35-36 of the Transcript.) At the conclusion of the arguments the court indicated orally its decision to be in favor of the complainant as to his contentions against the defendants Whiteside and Alexander and in favor of the dismissal of the bill against defendant Tallas, and directed the solicitors for the complainant to prepare a decree accordingly and submit the same to the court. (See page 36 of the transcript.)

This action was not primarily an action to determine the title to the bed of navigable water nor to an island which grew upon it. The action, based upon the undisputed and admitted ownership of the plaintiff's shore lands, as to his possession and right of possession of which there is no dispute, was brought to determine the extent, in view of all of the complicated circumstances of the cause, involving both law and fact, of the riparian rights incidental and appurtenant to such shore ownership, such rights in many respects, in view of the peculiar facts and circumstances, resting upon principles of equity.

The plaintiff, as in the case of *Sullivan Timber Co. v.*

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*Mobile*, 110 Fed. 186, did not claim ownership of the bed nor of any island that grew upon it. In the *Sullivan* case the plaintiff had not utilized, by improvement, all of its riparian rights and privileges.

The plaintiff doubted whether such title could be claimed to be vested in him with respect to an island grown upon the bed, the title to which is held to be in the state, as would support a simple action in ejectment, but whether it would or not on the ground of right of exclusive possession and use, subject to the public rights, this action is properly one of an equitable character to determine the extent of plaintiff's riparian rights, a determination distinctly for a court of equity rather than for a court of law, a controversy which could not be determined by a jury but which, even if it occurred in an action where there was a jury, the court would have to determine and instruct the jury accordingly. Tallas was a proper party to the proceeding.

The action was against several defendants claiming certain rights, alleged to be an infringement of the plaintiff's riparian rights appurtenant to his shore ownership. As said before, the plaintiff's ownership and possession of the shore property was not in dispute but was admitted. The defendant Whiteside's ownership and possession of the shore property opposite this navigable water was not in dispute but was admitted. No question of their respective possession of their shore property was in controversy. As to all of the defendants except the defendant Tallas, there is no claim made, even by the defendant Tallas, that the court of equity is without jurisdiction. It is the extent of the riparian rights incidental and appurtenant to these respective properties that is in controversy.

There are several defendants. No question is raised by any of them, nor can there be, as to the jurisdiction of this court, so far as the nature of the action is concerned, except that attempted to be raised by counsel for the



defendant Tallas. The defendant Tallas claims no right of interference and no right whatever except such as he claims to have gained by occupancy. He has no muniment of title from the defendant Whiteside or anybody else, but claims to have succeeded by occupancy to rights which he claims Whiteside possessed. The defendant Alexander, through certain property owned by him, and the defendant Whiteside, through certain property owned by him, and the defendant Tallas, by virtue of his intrusion upon what he claims to have been the property of Whiteside, all claim rights that diminish the rights which the plaintiff claims he is entitled to enjoy by virtue of his admitted ownership of the shore lands which lie within this district. The main issue is between the plaintiff and defendants Whiteside and Alexander; the issue with Tallas is incidental by virtue of the limited occupancy shown. The whole question could not be determined in an action between the plaintiff and the defendant Tallas. It takes all of these parties to determine the questions involved, and even if this action should be held to be one in the nature of a bill of peace, which the counsel for Tallas choose to call it, the number of parties defendant and the character of their interests or claims are such as to bring the same within the first class mentioned by the court in *Boston v. Montana*, 188 U. S. 632, viz: "One brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests." But, without limiting the matter to the statement of any narrow rule, a court of equity should not require a party plaintiff to bring repeated actions in order to secure and protect his rights, where all of the rights of all of the parties can be determined in a single action in equity, and here the jurisdiction of the court of equity was necessarily invoked in order to determine the questions involved, admittedly, even by counsel for defendant Tallas, as to all except his client.

Upon the construction of the law applicable to the facts in this case, as established on the record, the court



must of necessity hold that the defendant Tallas could gain no title to the portion of the island remaining, by occupancy, nor was there any one from whom he could acquire it adversely to the other parties to the suit. Such was the view of the trial court as expressed in *Hobart v. Hall*, 174 Fed. 433. (Affirmed in 186 Fed. 426.) Because, therefore, he says, "I am in possession claiming to own", can he thereby rob this court of equity of jurisdiction which it had of the parties and subject matter, and rob it of the power and duty to determine this cause upon its merits, and compel plaintiff to try two law suits before this same court to accomplish what could as readily be reached in one? If so, then Federal procedure needs reformation.

At the beginning of the discussion as to parties in 16th *Cyc.* p. 181 it is stated:

"The fundamental rule as to parties to suits in equity is that however numerous they may be all persons interested in the subject of the suit and its results should be made parties. The reason for the rule is the aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order perfectly safe to those who have to obey it, and to prevent further litigation."

In *Minnesota v. Northern Securities Company*, 184 U. S. 199; Book 46 Lawyers' Edition 499, at page 515 of L. Ed., Mr. Justice Shiras said:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a



multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits."

In *Kelly v. Boettcher*, 85 Federal, on page 64, Mr. Justice Sanborn stated that a proper party is one who has an interest in the subject matter of the litigation which may be conveniently settled therein.

The defendant Tallas answered on the merits, and either admitted or put in issue the allegations of the bill of complaint, and asked for affirmative relief, which he might properly ask for as against the plaintiff, but which he could not ask for as against his co-defendants without a cross bill. He entered no demurrer, made no plea to the jurisdiction in his answer, except a plea on another and wholly ineffectual ground which he did not urge, viz: for want of further parties plaintiff. He participated in all of the proceedings before the special examiner, entered into all of the stipulations, cross-examined witnesses, and never raised this question until the final arguments after the cause was submitted to the court upon the record. We submit that it was too late to raise such objection and that the court should have disregarded it, and that there is no reason apparent upon such objection why the court should discontinue its jurisdiction of this case as to Tallas, send him hence and require the plaintiff, after all of the labor and expense incurred, to proceed again in the other side of the court to establish the same facts.

Upon these questions we submit without comment the following authorities:

Pomeroy's Equity Jurisprudence, Vol. 1, Sec.  
180-181.



United States v. Union Pac. Ry. Co. and Western Union Tel. Co., 160 U. S. 1, 40 L. Ed. 319.

Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 36 L. Ed. 537.

Sill, Assignee v. Solberg, 6 Fed. 468.

Leighton v. Young, 52 Fed. 439.

Union Mill & Mining Co. v. Danberg, 81 Fed. at page 86.

The Estate of James Foster, 15 Hun. page 387.

Danell's Chancery Pr., Vol. 1, 6th Am. Ed., page 556.

Lewis v. Cocks, 90 U. S. 466, 23 L. Ed. 70.

Hipp v. Babin, 19 How. 271.

Killian v. Ebbinghaus, 110 U. S. 568.

Boyce v. Grundy, 3 Peters 210.

Oelrichs v. Williams, 82 U. S. 211.

Hapgood v. Berry, 157 Fed. 807.

Zimmerman v. Carpenter, 84 Fed. 747.

Underhill v. Van Cortlandt, 2 John Ch. 339.

Attorney General v. Purmort, 5 Paige 620.

Cutting v. Dana, 25 N. J. Eq. 265.

Clark v. Flint, 22 Pick. 231.

Grandin et al v. LeRoy & Smyth, 2 Paige 508.

Schoolfield v. Rhodes et al., 82 Fed. 153.

Toledo Computing Scale Co. v. Computing Scale Co., 142 Fed. 919.

Consolidated Roller Mill Co. v. Coombs, 39 Fed. 25.

Dederick v. Fox, 56 Fed. 714.

Perego v. Dodge, 163 U. S. 160, 41 L. Ed. 113.

It is suggested that the objection of defendant Tallas to the jurisdiction of the court to determine the cause as to him, came too late and had been waived.



The following cases are referred to without discussion :

- Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753.  
 Kilbourn v. Sunderland, 130 U. S. 505, 32 L.  
 Ed. 1005.  
 Cummings v. The Mayor, 11 Paige Ch. 596.  
 Levi v. Evans, 57 Fed. 677.  
 Brown, Bonnell & Co. v. Lake Superior Iron  
 Company, 134 U. S. 530.  
 Kaufman v. Wiener, 169 Ill. 596; 48 N. E. 479.  
 Freeland v. Wright, 154 Mass. 492; 28 N. E.  
 Rep. 678.  
 Harding v. Olson, 177 Ill. 298; 52 N. E. 482.  
 Ward v. Todd, 103 U. S. 327.  
 Green v. Turner, 98 Fed. 756.

The defendant Tallas answered to the merits, asked affirmative relief, participated in the introduction of evidence, and speculated upon the proceedings and then concluded to run to cover and try to get out from under the jurisdiction of the court.

We submit that the court should have retained jurisdiction of all of the parties and made one complete adjudication of the whole case, and not relegate the plaintiff to the necessity of bringing an action at law on this one matter against this one defendant after his cause has been fully submitted to the court on the merits, upon which submission it is apparent to the court that the plaintiff is entitled to the relief sought. The plaintiff should not be required again to pursue the litigation in an action at law, to secure what he is entitled to as shown in this cause. The decree of the court in equity is enforceable, and it can give to the plaintiff all of the remedy that he requires, and in it justice may be done to all of the parties without another trial. We submit that coincident with this power it was the duty of



the court to have entered such a decree, and that the Court of Appeals should have required it, and affirming the dismissal as to Tallas.

Respectfully submitted.

Duluth, February 2, 1915.

JED L. WASHBURN,  
WILLIAM D. BAILEY,  
OSCAR MITCHELL,  
ALBERT C. GILLETTE,

Solicitors and of Counsel for A



at the Circuit  
and erred in

for Appellant.



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STANDARD

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NUMBER

DATE

TIME

PLACE



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

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GEORGE W. NORTON, as Executor and Trustee of  
the Estate of GEORGE W. NORTON, Deceased,  
Appellant,

against

ROBERT B. WHITESIDE and  
ANDREW J. TALLAS,  
Appellees.

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No. 339.

Appeal from the United States Circuit Court of Appeals for  
the Eighth Circuit.

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## APPELLANT'S BRIEF IN REPLY.

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The first 44 pages of the brief for Whiteside are devoted to an attempt to demonstrate that this court is without jurisdiction in this cause for the reason asserted that the determination of the rights of the plaintiff does not depend upon the validity or construction of the Constitution or any law of the United States, and that the controversy does not arise under the Constitution or laws of the United States.

We believe the argument not sound. It may not be at all necessary to do so, but this cause is of such importance, both private and public, that we are constrained to tender a



short argument in reply to that portion at least of appellee's brief.

It would seem that the counsel had taken the case of *Shulthis vs. McDougal*, 225 U. S. 561, and the discussion of principles and review of cases by the court in connection with that case, and has persuaded himself that they apply to this cause in such a manner that a decision on the merits may be avoided.

They argue that the plaintiff not only has not stated, but could not state, in his bill of complaint, any question or controversy so arising under the Constitution or laws of the United States as to furnish jurisdiction to the Federal Courts.

In considering this question we look first to the Act of March 3rd, 1891, 26 U. S. Stats. at Large, 827, *Federal Statutes Annotated*, Vol. 4, p. 398. Section 5 of this Act provides that appeals or writs of error may be taken from the District Courts to the Supreme Court in certain cases, among others "in any case that involves the construction or application of the Constitution of the United States." Sub. 4. Under this section it is well settled that if a question arises in the bill of complaint or at any time subsequent thereto, the defeated party may appeal direct to the Supreme Court.

If a federal question coming under Section 5 is the only ground for federal jurisdiction, the defeated party can go nowhere else but to the Supreme Court of the United States. The Circuit Court of Appeals is without jurisdiction to affirm or reverse the judgment of the District Court, and if it assumes to exercise appellate jurisdiction in such a case the Supreme Court will reverse on that ground alone. *Union etc. Bank vs. Memphis*, 189 U. S. 71.



In *Cummings vs. City of Chicago*, 188 U. S. 410, the plaintiff, a riparian owner on the Calumet River claimed the right to construct a dock under permit from the War Department. It was held that the case presented a federal question under Section 5, because the Secretary of War acted under authority of Congress and Congress acted under the authority of the Constitution, which gives the federal government paramount authority over all navigable waters.

This would seem to determine that in this case the controversy between Norton and Whiteside presents a federal question under Section 5, and that appeal should, or at least could, have been taken direct to the Supreme Court.

In no event then could we be cut off from reaching this court by reason of Whiteside's appeal to the Circuit Court of Appeals, although Whiteside might have precluded himself from doing so and certainly would have lost his right to appeal here unless saved by the fact that there was also diversity of citizenship in this case.

If federal jurisdiction depended only upon a question arising under Section 5, an appeal to the Circuit Court of Appeals would be without avail, and the Circuit Court of Appeals' decision would be subject to reversal on appeal, for that court would have been without power to make it.

Section 6 of the Act referred to provides that the Circuit Court of Appeals shall have appellate jurisdiction in all cases except those provided for in Section 5, and that in all cases where the jurisdiction depends entirely upon diversity of citizenship, the decision of that court shall be final, except that the United States Supreme Court may in its discretion review the same upon writ of certiorari.

This section is analyzed in *Federal Statutes Annotated*, Vol. 4, p. 409, et seq., in *Rose's Code*, Vol. 1, p. 239, and the



note to *Bagley vs. Company*, 212 U. S. 477, and other cases herein referred to.

If there is a diversity of citizenship and also a federal question not arising under Section 5, then the appeal must be to the Circuit Court of Appeals, but a further appeal will lie from that court to the Supreme Court. In such a case the federal question must appear upon the face of the bill of complaint, and it is not sufficient that it arises in the course of the trial. That is, it must appear from the face of the bill of complaint that the controversy arises under the Constitution or laws of the United States.

*Hanford vs. Davies*, 163 U. S. 273, cited by counsel, was an action to quiet title. The plaintiff claimed under a contract with the Territory of Washington. He alleged that his land had been sold under an order of the Probate Court and that such order impaired the obligation of his contract with the said Territory. It was held that a jurisdictional question was not stated because it was not alleged that the Probate Court acted under authority of any state statute, which impaired the obligation of his contract. There had been no allegation that plaintiff was deprived of his property without due process of law, and he was not allowed to urge this ground. The court said that it is not necessary to state, in so many words, the grounds of jurisdiction so long as all of the facts creating such grounds are positively alleged.

Now let us turn to the bill of complaint in the case now before the court, and see whether it does not most conclusively on its face exhibit a controversy to be decided which arises under the laws of the United States in such manner as without a shadow of doubt to give the court jurisdiction; a controversy of such a character that upon the effect and construction to be given to the Constitution and laws of the United States the result depends.



The bill alleged that the controversy so arises. Then the bill proceeds to allege at length the laws and the facts positively and explicitly and the controversy that has arisen thereunder.

The bill alleged:

The ownership by plaintiff and defendant of lands, formerly a part of the Northwest Territory ceded to the United States by Virginia, lying in the States of Minnesota and Wisconsin, respectively, and on opposite sides of St. Louis Bay, an arm of Lake Superior;

The Ordinance of 1787 setting out Article IV thereof *in haec verbae*, which provided that the waters leading into the Mississippi and St. Lawrence Rivers should remain common highways forever, etc.;

The Act of Congress of May 18, 1796, providing for the sale of these lands and setting out *in haec verbae* the provision of the Act, that all navigable rivers within the territory should be deemed to be and remain public highways, and in case of non-navigable streams where opposite banks are owned by different persons, the stream and bed should be common to both;

That there was formed out of the territory, the states of Ohio, Indiana, Michigan, Wisconsin and a portion of Minnesota, and that in the various Enabling Acts for these states, Congress preserved the navigable waters within or bordering upon the same as common highways;

The language of the Enabling Acts of Minnesota and Wisconsin in describing the boundaries;

That by acquiescence this boundary line passes through this body of water between plaintiff's and defendant's lands;



The patenting of the lands;

That the title to the bed of these waters is vested in the states in sovereign, and not proprietary, capacity, in an inalienable trust for the public;

That private grants of lands abutting on these waters (inclusive of those here involved) extend only to the shore with incidental riparian rights;

That the United States retained the supervision and control over the navigable waters of the Great Lakes and the arms and bays thereof, and the navigable rivers and lakes bordering upon or within the states created in whole or in part out of the Northwest Territory, including the improvement of the channels and harbors thereof;

That the United States, under congressional authority, has conducted vast schemes of improvement in aid of navigation, and fixed lines in the harbors and along the shores which private owners may not transcend, all of which it is alleged were preserved to the United States under the fundamental laws by which these states were admitted into this Union;

The question of the purpose and intent of all these enactments (top p. 7, Transcript); that the purpose was to preserve and maintain the rights of the respective states and citizens thereof, to have access to the navigable and navigated channels of such boundary waters, and that among the most ancient and important rights of private owners of shore lands abutting on such boundary waters is the right to wharf out to the navigable waters and have connection therewith from the shore land, and with commerce upon the navigable part, subject to control of the United States over the whole of such waters;

That subsequent to the survey and disposition of these



lands, there grew up a small island in the bed of this boundary water, and the allegation is made that the same vested in the state or states as the residue of the bed or subaqueous lands; that the same was never surveyed, and that no private ownership thereof could be obtained save such right of use as might inhere in a shore owner, if the same falls within the zone of his riparian rights;

The supervision of the War Department and the establishment of the dock lines by the Department under authority of the Act of Congress of September 19, 1890, and the approval of these dock lines December 5, 1894;

That the said dock line on the Minensota side extended through said low, marshy island, and the one on the Wisconsin side somewhat southerly from the same;

The survey and examination of these waters and the re-establishment of the dock lines under the authority of Acts of Congress of July 13, 1892, June 3, 1896, and March 3, 1899, and the approval of the survey and map by the Secretary of War November 17, 1899, under authority of Congress;

The improvement by the War Department under authority of Congress of the channel between these dock lines; the crossing and recrossing of the thread of former deepest water by this improved channel as it extended on the same course through these waters (substantially through the middle as the maps show), and the cutting through said low, marshy island and the disappearing of a part of it, and the filling up of the old channel;

The claim of defendants to such an ownership of the bed and of said marshy island that grew upon it as permits them to intervene between the plaintiff and the improved channel;



That defendants have no ownership of it or of any of the subaqueous lands.

In the prayer for relief the plaintiff asked a determination that, as the shore owner in Minnesota, his rights and privileges extend out to the dock line as established, and out to the navigable channel as improved by authority of Congress; and that the defendants be decreed to have no title to the subaqueous lands lying between plaintiff's shore and the dock line, including the said parcel that had appeared upon the surface.

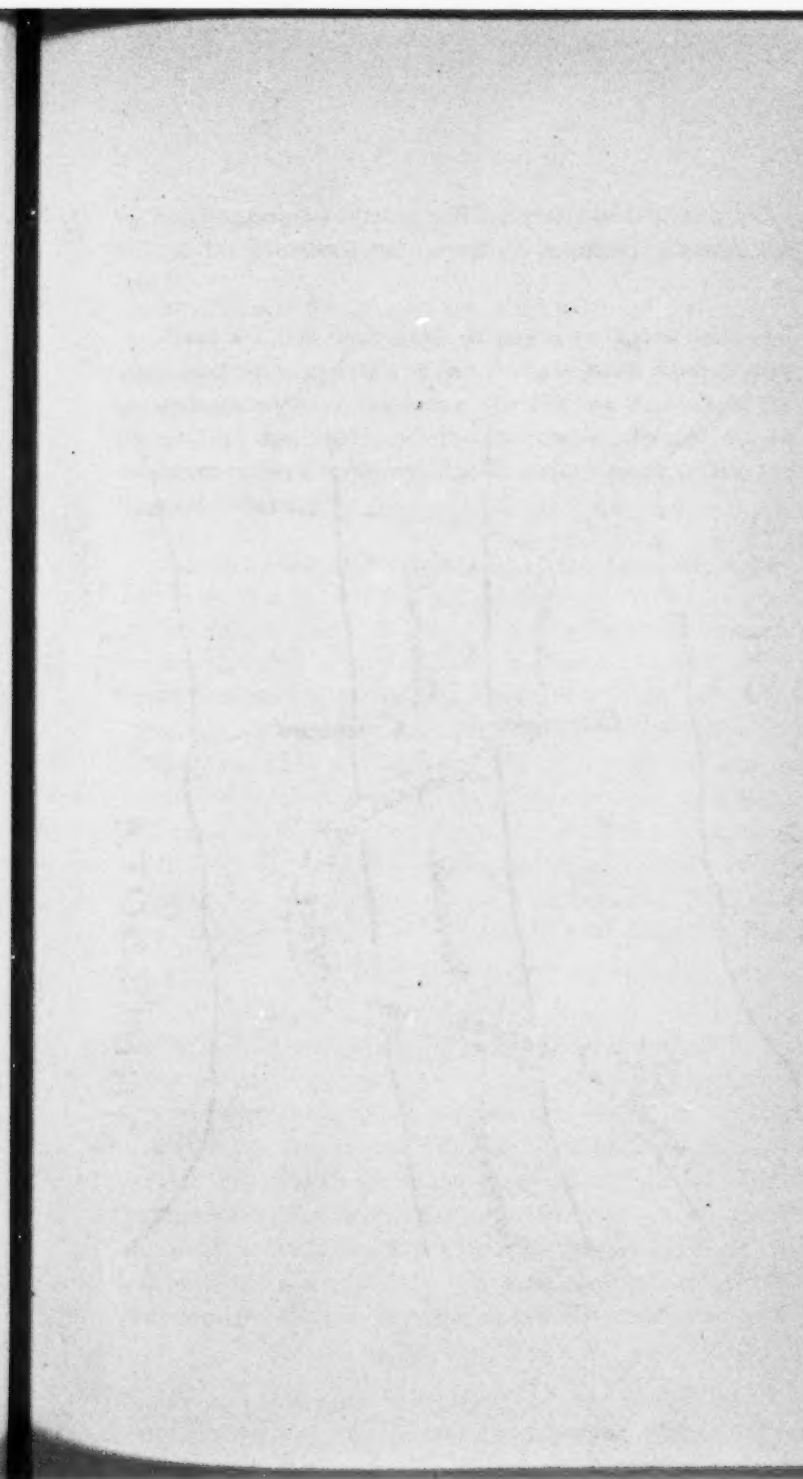
It thus appears from the face of the bill that all of the property rights of all the parties, the rights of the states, the boundary line between the states, its location and its effect upon the rights of these parties, the character of these waters and the power of the federal government over them, and the matters set forth as related, the interpretation to be given to the description of the constitutional boundary, as well as to the rights of shore owners, all depend upon the construction of the Constitution and the laws of the United States alleged, and the effect to be given the same, upon which the result will depend.

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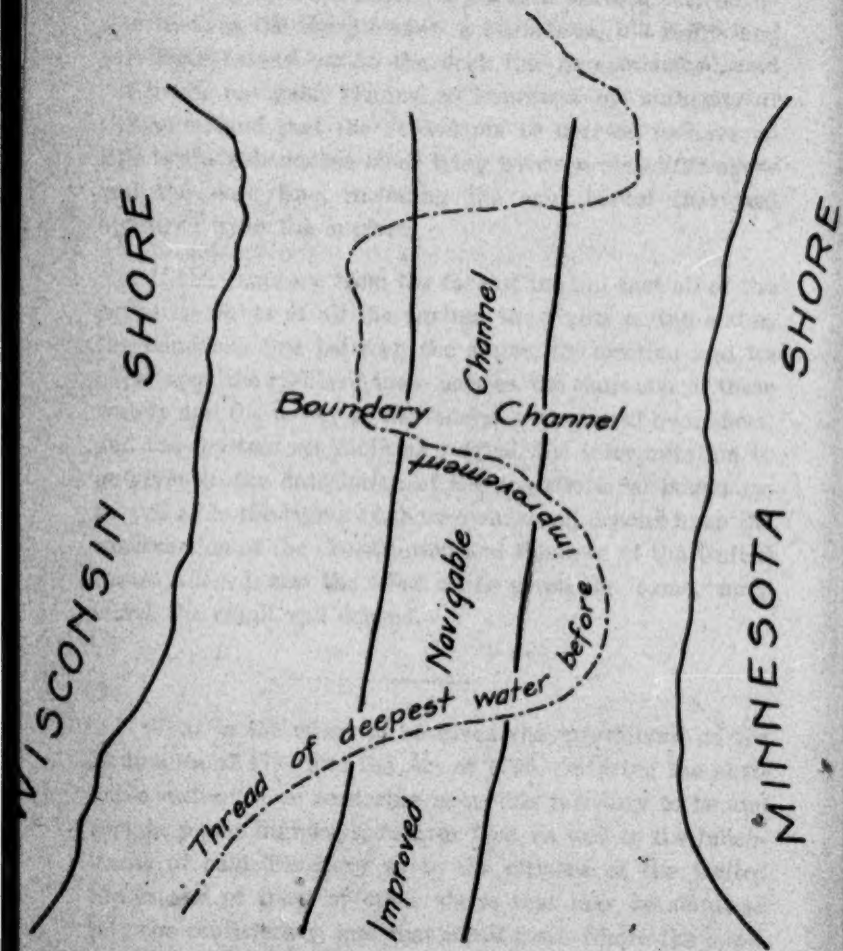
What is the effect to be given the provisions of the Ordinance of 1787 and the Act of 1796, declaring the navigable waters in or bordering upon this territory to be and remain public highways, forever free, as well to the inhabitants of said Territory as to the citizens of the United States and of those of other states that may be admitted into the confederacy, and that in all cases where the opposite banks of any stream not navigable shall belong to different persons the stream and the bed shall be common to both?

What effect is to be given to the reservation of control and power of regulation and improvement over such waters











by the general government and especially in the interpretation of the constitutional interstate boundary through the same?

Does not this reservation of power so fasten upon and affect this boundary description that the same must always be interpreted with reference thereto, so that when the power is exercised and the navigable channel of the boundary waters improved, the boundary must follow the improved channel?

Let this question be elucidated by the preceding figure.



Because in the early history of the country the thread of deepest water followed the sinuous course of the dotted line in the figure, must the boundary descriptions "through" or "through the middle" be forever construed to follow such course and operate to cut off access to the improved channel, which the Government always reserved the power to make?

The complaint alleges these waters to be an arm of Lake Superior. This is to be taken as true in considering what questions appear on the face of the complaint.

Can there be any private ownership of the beds in such waters?

Is not the title to the bed, whether an arm of the lake or a stream, vested in the states in sovereign capacity as an inalienable trust?

Can any private proprietary ownership grow upon a bed owned in sovereign title by a state, by such bed in some spot rearing itself above the surface?

Does not the United States have just exactly the same right and power over such a spot or island after it has appeared as it has over the rest of the waters, and power to treat it as it does the rest of the bed in improving the channel?

Can a party owning land on the shore claim such an ownership in the bed in such waters, either with or without the uprising of an island, as will permit him to interpose himself between the opposite shore owner and the improved channel?

These questions all appear on the face of the complaint. Upon their determination depends the result of the controversy. Especially the question as to whether the interstate boundary shall be construed to follow through the



improved channel through the middle of these waters is alone sufficient to determine the controversy. Did it ever become *fixed* anywhere else?

The decision of a Minnesota court that Norton's rights extended to the improved channel would not be conclusive on a Wisconsin court, and would have no effect if the property in question is in Wisconsin.

The decision of a Wisconsin court that Whiteside's rights extended to the thread of deepest water in the channel as it existed at some time in the past would not be conclusive on a Minnesota court, and would have no effect if the property is in Minnesota.

The real question then is—where is the property, in Minnesota or Wisconsin, and that depends upon the answer to the question—what is the boundary between the two states? That answer must be and can only be determined as a federal question and by the federal courts. It can only be solved by the Constitution and laws of the United States. It cannot be answered by the Constitution or laws or decisions of Minnesota. They only apply to territory within Minnesota's boundaries. It cannot be answered by the Constitution or laws or decisions of Wisconsin. They only apply to territory within Wisconsin's boundaries. *After* it has been determined by the Federal Constitution and laws what the boundary between the two states is, *then and then only* will the federal question be solved, and *then and then only* can it be said that the title and rights to the property would be governed and determined by the law of the state within whose boundaries the Federal Constitution and laws may determine it to be. Therefore, the real question in the case is a federal question,—what is the boundary between Wisconsin and Minnesota? What is the proper interpretation under the conditions existing to be given to the description of the constitutional boundary? If it be



determined that the property in question is in Wisconsin, then there is no other serious question left, for admittedly Norton has no interest in it. If, on the other hand, it be determined that it is in Minnesota, then there is no other serious question left, for admittedly Whiteside has no interest in it. The question is not what is the law of Minnesota if the property is in Minnesota, or what is the law of Wisconsin if the property is in Wisconsin, but the question is whether the *locus in quo* is in Minnesota or Wisconsin. If it is in Wisconsin Whiteside's rights are secure,—if in Minnesota Norton's rights are unassailable, except that on another branch of the case we maintain that in whichever state the *locus in quo* is situated the citizens and owners of property have the right to reach the navigable channel. But on this branch of the case there is no question between Norton and Whiteside if the Wisconsin law governs the *locus in quo*; neither is there if the Minnesota law is held to govern. But the question is—does the Wisconsin law govern or does the Minnesota law govern, and that can be only answered by answering the question—in which state is the *locus in quo*?

We say the property is in Minnesota because under the Constitution of the United States and the laws under which the two states were admitted to the Union the state boundary follows the main navigable channel, varying somewhat within the banks as the main navigable channel varies by natural means, or as improved in aid of navigation under the laws of Congress, but subject to no more variation than is the channel itself. They say the property is in Wisconsin because at some more or less indefinite time the boundary became once and for all immutably fixed in some theoretically definite line, which, however, it is impossible to locate with accuracy, and which, by reason of natural causes and improvements in aid of navigation under the laws of Congress has long since become obsolete for any practical purpose, and which never was anything more than a theoretical



line, the exact location of which is undiscovered and undiscoverable.

It is our contention that as long as the improvements in aid of navigation remain within the limits of the boundary channel, and do not reach private property that must be condemned by the Government in order to make them, just so far the rights of shore owners on either side extend to, reach and follow the channel as improved. This is the only practical rule. Otherwise every improvement within a boundary channel made by the government to improve navigation is likely to result in entirely shutting off the citizens and owners on one side or the other from access to navigation.

The little island, improperly so-called, arose out of the bed of water, a place over which the federal government has by its Constitution and laws retained jurisdiction as navigable water. It was incapable of private ownership in fee, at any rate as against the federal government, and treating it as such the federal government dredged much of it out in aid of navigation, and much more of it floated away and disappeared in the process. The rights of private parties in it could not become greater or different than in the waters from which it arose. If private rights had become greater or different, then it would have been necessary for the federal government to condemn in order to dredge the channel through it in aid of navigation, but our contention is that no such condemnation was necessary. The Government did not deem it necessary and did not condemn and there was no protest. The rights of private parties with reference to the area where it arose are exactly the same as before it appeared, no greater and no less. Counsel for Whitside originally conceded this and ought to do so now, but they have concluded that it is wiser to claim this so-called Tallas Island as a tract of land susceptible of private ownership, and to endeavor to have it appear that we



are claiming the right by government improvement to divest them of title thereto. Our contention is that they never owned it. The rights of the parties may be determined according to the law of Minnesota or Wisconsin, according as the so-called island is found to be in Minnesota or Wisconsin, but when that question is determined there will be no more serious question as between the appellant and appellee than as though the area of the island were still covered with water.

All these questions have been argued for days in the District (then Circuit) Court. There never was a question raised that was not a federal question, except the one claim that how far a Wisconsin riparian proprietor might claim title in the bed of a stream by state concession was a matter of local law.

We do not claim that the question of whether particular waters are those of a stream or lake is of itself a question for a Federal Court more than any other, but when the fact, for instance, that the waters are those of the lake is alleged or established in accordance with the allegation, then certain of the questions above set forth necessarily arise which are for Federal Court determination, under the laws of the United States.

The plaintiff alleged what the defendants claimed their rights to be and what they asserted the right to do to the destruction of the enjoyment by plaintiff of what he alleged his rights to be under the conditions arising under the laws alleged.

The defendant's answer asserted those very claims. The whole claim of the defendant is that whether these are waters of a bay of Lake Superior or of St. Louis River, the constitutional boundary described as running through or through the middle must forever follow the sinuous thread



of deepest water before the channel was improved; that after this little island appeared near the Minnesota shore the thread of deepest water led around that island between it and the Minnesota shore; that when the Government improved the channel through the middle, cutting away a part and leaving a part of the island between the channel and the Minnesota shore, the interstate boundary still kept to the old snake-like thread; that the defendant owned the bed to that sinuous line and hence owned the island, and island or no island has a right to be between us and the improved channel; in other words, that there the boundary became fixed forever as a proper interpretation of the constitutional boundary description, to which line defendant claims to own, and that the reserved power of improvement by the federal government and the actual improvement made by it, is to be given no effect in determining what, under the existing conditions and the constitutional description, is the proper location of the interstate boundary; and that neither the provision of the Ordinance of 1787 that these waters be preserved as public highways, nor the power of the general government over them as such have any effect.

All of the above is upon the question of jurisdiction. In our argument on the merits we think we show conclusively from the records that these are waters of a bay of Lake Superior. If we are right in this we maintain under authorities discussed that all ground is cut from under the appellee, and such we believe is the view of his counsel.

The specious claim that a new channel has been dug, like a canal, has been dealt with in our discussion upon the merits. That is not what the government did here.

We perfected our appeal in this case and, out of abundant caution, we followed a practice which we were advised had been done in cases before, and also took up the



case by certiorari. The court denied the writ, as we believed it would, and that left the case before the court on this appeal. That counsel for plaintiff shrank from the responsibility of determining that there was no risk as to appeal being the proper method, can have no effect on the questions here involved, and such a suggestion is quite unworthy.

Upon a full consideration of the matter, we believe it indisputably true that these questions arising upon the allegations of the complaint show a controversy of such character as to give this court jurisdiction, and we earnestly hope for a determination upon the merits.

We do not find it necessary to discuss the cases referred to in Part 1 of appellee's brief. We have no quarrel with those cases.

Whether under Section 5 or Section 6, of the Judiciary Act, this cause is appealable to this court.

Twenty-nine other pages of appellee's brief are devoted to the contention that the Circuit Court of Minnesota was without jurisdiction. As every question in this case, save the one as to whether the presence of an interstate boundary in the bed can prevent a shore owner on a stream from reaching navigable water in this territory, would have to be decided favorably to the appellee before his argument would apply, it has not seemed profitable to discuss it. If we must first be defeated on the merits before appellee's juridical test can be applied we shall not then care much what becomes of that question.

Respectfully submitted,

JED L. WASHBURN,  
WILLIAM D. BAILEY,  
OSCAR MITCHELL,  
ALBERT C. GILLETTE,

Solicitors and of Counsel for Appellant,  
George W. Norton, Executor.



# Supreme Court of the United States

OCTOBER TERM, 1914.

No. 339.

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GEORGE W. NORTON, as Executor and Trustee  
of the Estate of George W. Norton, Deceased,  
Appellant.

—vs—

ROBERT B. WHITESIDE and  
ANDREW J. TALLAS,  
Appellees.

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BRIEF FOR ANDREW J. TALLAS, APPELLEE.

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This Court has no Jurisdiction in this Case.

The appellee, Tallas, maintains that this court is without jurisdiction upon two grounds:

1. That no Federal question is involved in the appeal.

2. That the action brought by the plaintiff is an equitable action to quiet title; that it appears upon the face of the record that the appellee, Tallas, was in possession of the premises, at the time the action was commenced; and it is contended that, in such case, the right or title to property cannot be determined by an action in equity to quiet title, but only by an action in ejectment.

On the first proposition, that no Federal question is involved, the same question is involved between appellant and this appellee, as between appellant and appellee, Whiteside, and we shall not burden the court with addi-



tional argument on that point, but hereby adopt and present the brief and argument of appellee, Whiteside.

On the second point, we contended in the trial court that it had no jurisdiction for the reason that it appeared the appellee, Tallas, was in possession of the premises at the time the action was commenced, and long prior thereto, claiming title to the premises in question; and appellee moved to dismiss the bill as to him, upon the ground that a court in equity had no jurisdiction, and that appellant's only remedy was by ejectment, and the trial court dismissed the bill as to this appellee, on the grounds set forth above, and was sustained by the Circuit Court of Appeals.

That appellee was in possession of said island, referred to in the bill, at the time the action was commenced, appears upon the face of the record.

Appellant, in paragraph 20 of his bill, (Record, page 9), alleges that appellee had some time since entered upon said island, erected a cabin thereon, and pretended to occupy the same.

In paragraph 17 of this appellee's answer, (Record, page 28), appellee averred that the said island was in the State of Wisconsin; that appellee had been in continuous, open and hostile possession of said island for more than twenty-two years prior to the commencement of said action claiming title thereto, and that during all of said time his title thereto had never been disputed by any one, except by the appellee, Whiteside, between whom and this appellee an action in ejectment was pending in the courts of Wisconsin, but which was still undecided.

The appellee, Tallas, testified that he was in possession of said island at the time the action herein was commenced (Record, page 112).

At paragraph 27 of the decree, (Record, page 135), the trial court dismissed the bill as to this appellee on the ground that the court had no jurisdiction in an action in equity, to determine the rights of this appellee, but



that resort must be had to an action at law to determine said question.

The Circuit Court of Appeals affirmed the lower court in dismissing the bill, as to this appellee. (Record, page 156).

This appellee contended in the lower courts, as he contends here, that the bill, *as to Tallas*, was an action to recover possession of the island, then admittedly in the possession of Tallas, and to quiet plaintiff's title thereto. He contended that the action was an action in ejectment, in the guise of a bill in chancery, and that the plaintiff had a plain, speedy and adequate remedy at law by ejectment, and that the court, therefore, had no jurisdiction to determine appellee's right and title in an action in equity.

In support of this proposition we cite the following authorities:

- Section 723 R. S. of the United States
- Hipp et al, vs. Babin et al, 19 Howard, 271.
- Whitehead vs. Shattuck, 138 U. S., 146.
- Sanders vs. Devereux, 60 Fed., Rep. 311.
- Jones et al, vs. MacKenzie et al, (C. C. A.)  
122 Fed., Rep. 390.
- Union Pacific R. Co. vs. Cunningham, 173  
Fed., 90.
- U. S. vs. Wilson, 118 U. S., 86.
- Boston Co. vs. Montana Co., 188 U. S., 632.
- Lamson vs. Mining Co., 207 U. S., 1, at page  
9.

If, as the above authorities hold, the Federal courts have no jurisdiction, where an action is brought in equity to quiet title, as against one in possession claiming title, then this court is without jurisdiction, for the reason it appears upon the face of the bill itself that appellee was in possession at the time the action was commenced.



If, however, this court should consider it has jurisdiction to pass upon the appeal, then appellee, submits the case on its merits on the authorities hereinbefore cited, to the effect that appellant's only remedy as against this appellee is by an action in ejectment.

Dated, March 15th, 1915.

Respectfully submitted,

DANIEL G. CASH,

JOHN B. RICHARDS, JR.,

Solicitors and of Counsel for  
Appellee, Andrew J. Tallas.



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# SUPREME COURT

OF THE

## UNITED STATES

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OCTOBER TERM, A. D. 1914.

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No. 339.

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GEORGE W. NORTON, As Executor and  
Trustee of the Estate of GEORGE W.  
NORTON, Deceased,

Appellant,

vs.

ROBERT B. WHITESIDE, and  
ANDREW J. TALLAS,

Appellees.

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**BRIEF FOR ROBERT B. WHITESIDE, APPELLEE.**

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### PART I.

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**THIS COURT IS WITHOUT JURISDICTION.**

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### ARGUMENT.

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The appellant here was plaintiff in the court below, and the appellee here was defendant there,



and, for the purpose of convenience, we shall hereafter refer to them as plaintiff and defendant, respectively.

After the plaintiff had perfected his appeal from the decision of the Circuit Court of Appeals to this court, he made application to this court for a writ of certiorari, which was denied.

In their brief on the application for the writ of certiorari, on page 19 of said brief, counsel for plaintiff said :

“The question as to whether the suit is one arising under the Constitution or laws of the United States *is not free from doubt*, and if it should be held that it is not, then the petitioner concedes that the decision and decree of the Circuit Court of Appeals is made final, except as petitioner would be entitled to review thereof by certiorari to this court.”

While we admit that the question of jurisdiction is not to be determined by any admission or concession made by counsel, nevertheless, the language referred to above is a plain indication that counsel for the plaintiff considered it was a question of grave doubt as to whether the suit was one arising under the Constitution or laws of the United States.

The defendant contends that the suit is one merely to determine the right and title to private



property interests, determinable alone by the application of the principles of local law, and that the right or title which the plaintiff asserts does not depend upon the validity, or construction, of any provision of the Constitution, or law of the United States, and that the decision of the Circuit Court of Appeals is, therefore, final, and this court is without jurisdiction; and, upon the foregoing grounds, defendant moves for a dismissal of the appeal.

The grounds upon which the jurisdiction of this court can be maintained, where it is alleged that a federal question is involved, have frequently been decided by this court and are, in the main, as follows:

1. Some right, title, privilege or immunity, dependent upon the construction of the Constitution, or some law or treaty, must be relied on, in order to raise a purely federal question.

Muse vs. Arlington Hotel Co., 168  
U. S. 430.

2. Mere general allegations that the construction of some law or the Constitution are involved are not sufficient. They must be based upon facts clearly alleged in the complaint.

Budzisz vs. Illinois Steel Co., 170  
U. S., 41.



3. The question as to whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the plaintiff's *statement of his own cause of action as set forth in the bill*, regardless of questions that may have been brought into the suit by answer, or in the course of the subsequent proceedings.

Colorado Central Mining Co., vs.  
Turck, 150 U. S. 138.

Tennessee vs. Union and Planters'  
Bank, 152 U. S. 452.

Devine vs. Los Angeles, 202 U. S. 313,  
333.

4. It is not enough that grounds of jurisdiction other than diverse citizenship may be *inferred argumentatively from the statements in the bill*, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth.

Hanford vs. Davies, 163 U. S. 273.

Mountain View Mining Co., vs. Mc-  
Fadden, 180 U. S. 533.

Shulthis vs. McDougall, 225 U. S.  
565.

5. A suit to enforce a right which takes its *origin* in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it



really and substantially involves a controversy respecting the validity, effect or construction of such law, *upon the determination of which the result depends.*

Blackburn vs. Portland Gold Mining  
Co., 175 U. S. 571.

Florida Central & P. R. Co., 176 U. S.  
321.

Shoshone Mining Co., vs. Reeter,  
177 U. S. 505.

According to the foregoing authorities, the question as to whether any federal question is involved in this case is dependent upon the question as to whether or not the plaintiff has, by clear and explicit statements in his bill, shown that the right or title which he asserts is dependent upon the validity, effect or construction of some specific provision of the Constitution, or some particular law of the United States; and it is not sufficient for him to allege, in general terms, that the construction of the Constitution, or certain laws, are involved, but he must specify definitely in his bill, what laws are involved, and how and in what manner the right which he asserts grows out of and is dependent upon the construction and effect of said laws.

It becomes necessary, therefore, to examine



the facts in the case, as set forth in the bill of complaint, to ascertain whether the plaintiff has raised a federal question.

Before considering the effect of the numerous statutes and laws of the United States, which plaintiff has pointed out and referred to in his bill, we desire to call attention to the ultimate relief which plaintiff sought to obtain in his suit, for the ascertainment of this fact will determine, in a large measure, whether the numerous statutes and laws mentioned, could, by any possibility, have any controlling effect on the ultimate relief sought by the plaintiff.

The bill of complaint is printed in the record, on pages from 2 to 11, and from its allegations it appears that a stream of water, about 2000 feet in width, separates the lands of the plaintiff from those of the defendant.

That the said stream is a bay or arm of Lake Superior, and that the lands of plaintiff are situated on the northerly, or Minnesota, side of said stream, and the lands of the defendant are located on the southerly, or Wisconsin, side of said stream.

That the channel or body of water between the lands of plaintiff and defendant is the boundary between the States of Minnesota and Wisconsin.

That subsequent to the survey and disposition



of the public lands, owned by plaintiff and defendant, a small island gradually formed between the lands of plaintiff and defendant; that the same has never been surveyed or disposed of as public land, and that the title to the same was in the State in which it was located, and that no private ownership could be had in such island, save such as inheres in the riparian rights of the owner of the shore lands abutting upon said waters.

That, in 1899, the War Department, under the authority of Congress, dredged a channel through a portion of said island, leaving a part of said island between the harbor or dock line on the Minnesota side and the shore of plaintiff's said lands, and the residue thereof between the said deep water channel and the established harbor line on the Wisconsin side, in front of said lands of the defendants.

That the defendant, Tallas, had, some time since, entered upon said island, built a cabin thereon and pretended to occupy the same.

That the said Tallas has so placed his cabin on said island as to intervene between plaintiff's lands and the said channel dredged out by the government, and is infringing upon plaintiff's riparian rights.

That plaintiff is informed and believes that the defendant Whiteside claims some rights in and



to said island as incident to his shore lands, located in Wisconsin, and that said defendant has no right or title thereto.

That the claims of said defendants if persisted in will operate to prevent plaintiff from reaching said channel dredged by the government, and work a cloud upon plaintiff's said title and estate.

Wherefore, plaintiff prays that it be adjudged that he is the owner in fee of his uplands, and that it be adjudged that he has the right to extend out to the said channel dredged by the government, and that defendants have no right, title, or interest in or to said island, or to any of the subaqueous lands, lying between plaintiff's shore lands and the said channel dredged out by the government.

It is apparent from the foregoing statement that the ultimate end sought by the plaintiff in this action was to have his right or title to the said Tallas Island, and his right and title to any of the subaqueous lands, lying between the said island and the said channel, dredged by the government, determined, and to have it decreed that none of the defendants had any right, title or interest in or to any of said property; in other words, it was an action to determine plaintiff's riparian rights.

This court has determined time and again that after the title to public lands has passed out of



the government, that, in a subsequent controversy over the right or title, the mere fact that the right or title asserted had its origin in the laws of the United States would not raise a federal question.

In *Shoshone Mining Company, vs. Reeter*, *supra*, on page 507, the court says:

“We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did, every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws.”

There is no distinction in this regard between the title to patented land, and the right or title to riparian rights property, the title to which passes as incident to the title of the upland.

In fact, the federal courts have uniformly held that, where the United States makes a grant of lands, bordering on navigable streams, the question as to the nature and extent of the title of the shore owner, in the bed of the stream, and to islands aris-



ing thereon, is governed *solely* by the law of the State where the lands are located.

Barney vs. Keokuk, 94 U. S. 324.

Hardin vs. Jordan, 140 U. S. 341.

Grand Rapids & Ind. Ry. Co., vs.  
Butler, 159 U. S. 87.

Hall vs. Hobart, 174 Fed. Rep. 439.

In *Barney vs. Keokuk, supra*, the court says:

“Whether as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine.”

Iowa holds that the title of the shore owner only extends to high water mark, and this court followed the decisions of the Supreme Court of that State.

Illinois and Michigan, however, hold that the shore owner takes title in the bed of the stream to the middle of the main channel, and in the 140 U. S. and 159 U. S., *supra*, which cases arose in Illinois and Michigan, respectively, this court followed the decisions of the Supreme Court of those States.

In the case of *Devine vs. Los Angeles*, 202 U. S., on page 337, the court says:



“In truth, the questions as to the nature and extent of complainants’ titles or rights, as put forward in the bill, are not Federal questions, but questions of State or general law.

“In *Hooker vs. Los Angeles, supra*, it was contended that the decision of the State court against the claim of plaintiffs in error to certain *riparian rights* and in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a privilege, right, title or immunity claimed under the Constitution or some statute or treaty of the United States, and so reviewable here. But this court held otherwise and we said:

“ ‘Obviously, the question as to the right or title of plaintiffs in error to the land, *and whatever appertained thereto*, was one of State law and general public law, on which the decision of the State court was final.’ ”

We contend, therefore, that, as the case at bar is merely one to establish plaintiff’s riparian rights, that it raises a question of *local* law, and no federal question is involved.

The plaintiff in his bill alleges, in general terms, that the cause arises under the Constitution and laws of the United States.

But, as shown by the authorities which we have heretofore cited, such allegations are insuf-



ficient, unless accompanied by a definite statement of facts specifying the particular laws under which it is claimed the right arose, and showing how and in what manner the plaintiff's right depends upon the validity or construction of the laws relied upon.

It is true that the plaintiff in this bill has *mentioned and referred to* numerous laws of the United States, but he has nowhere shown, by any statement of facts in his bill, how, or in what manner, his asserted right grew out of, or was dependent upon, the construction or validity of any of the acts of Congress mentioned in said bill.

The defendant contends that, in order for the plaintiff to have raised a federal question, which would warrant this court in reviewing it as such, the plaintiff in his bill must not only have referred to and mentioned federal statutes, from which it might be inferred, argumentatively, that the right asserted was dependent upon the construction of such laws, or statutes, but that it must appear by clear and definite statements of facts, in the bill, connecting the right which he asserts with specified laws, or statutes, and showing how, and in what manner, the right claimed is dependent upon the construction of the laws *specified*.

If this were not so, the plaintiff in this case



might have asserted the right which he did, that it grew out of and was dependent upon the construction of the laws of the United States, and then have referred to and mentioned every law that Congress had ever passed, without pointing out the particular law, upon the construction of which his right depended.

Such a proceeding would not present a federal question, such as could be reviewed by this court, for the test of jurisdiction in cases of this kind is, *that the bill must show by its own statements, affirmatively and logically, and not inferentially, or argumentatively, that a federal question is presented.*

It is not sufficient, even, that a federal question might have been raised, or that the facts in the case show that a federal question was actually involved. The test is that it must have been *asserted and relied upon* by statements of facts clearly made in the bill, showing how the right alleged is dependent upon the construction of the Constitution, or some law or statute.

In other words, the federal question must appear, upon the face of the bill, by mere inspection and without argument, or inference.

This position is sustained by the authorities.



In *Hanford vs. Davies, supra*, on page 27 the court says:

"The bill *proceeds upon the ground* that the orders of the Probate Court, resulting in the sale of the lands in controversy as the property of Lumley Franklin, and in the conveyance in 1888 to the defendant Davies, impaired the obligation of the alleged contract with the Territory as evidenced by the deed of 1878 to Thaddeus Hanford. *But it was not alleged in the bill* that the proceedings in the probate court *were had under any statute* that was repugnant to the United States, or which was enacted after the sale and conveyance of these lands by the Territory to Thaddeus Hanford."

The statement of facts in this case shows that the plaintiff in his bill alleged a specific contract with the Territory whereby it had conveyed the lands to the plaintiff, and it was further alleged in the bill that the action of the probate court in ordering the sale of the lands was in violation of certain provisions of the Federal Constitution and laws, nevertheless, the court held that no federal question was raised for the reason that plaintiff had failed to allege in his bill that the action of the probate court was had under any statute of the State that was repugnant to the Constitution.



On page 279 of the same case, the court says:

“But it is contended that the proceedings in the probate court did not constitute due process of law, and for that reason this suit is one arising under the Constitution of the United States. *No such thought was intended to be expressed in the bill*, and it is apparent that no such proposition was presented to the Circuit Court when it determined the question of jurisdiction. The suggestion of the want of due process of law in the proceedings in the probate court, first distinctly appears in the assignment of errors filed in the court below long after the final decree was entered.”

It appeared in the bill in this case that the property of the plaintiff had, by the order of the probate court, been sold and disposed of to another without authority of law.

Such an act as this is clearly not due process of law. But the court held that it was not sufficient that it should appear from the statements that a question of due process of law was, as a matter of fact, involved in the case, but that it must, *in addition*, appear, from clear and specific statements in the bill, that it was the intention of the plaintiff *to assert and rely* upon the fact, that the action taken was not due process of law.

A little later on the court says:



"It is true the bill alleges that the probate court in all of its proceedings acted 'entirely without jurisdiction and without color of authority save as the agent and organ of said Territory.

"But this allegation of the want of jurisdiction in the probate court is too general and indefinite to show its proceedings were wanting in due process of law. If the *purpose* was to present a case under the clause of the Constitution relating to due process of law, the *grounds* upon which the Federal Court could take cognizance of a suit of that character between citizens of the same State should have been clearly and distinctly *stated* in the bill.

\* \* \* It is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings but the averments should be positive."

This case, then, is authority for the proposition that it is not sufficient that the allegations in the bill show that a federal question might be, or is, *as a matter of fact*, involved, but it must, in addition, appear, that it was the "intention", or "purpose", of the pleader to assert and rely on the federal question, and that the intention or purpose is to be tested and determined by the question as to whether clear and positive statements have been made, showing how the right asserted is dependent on the construction of some



specific provision of the Constitution or laws of the United States.

The case of *Blackburn vs. Portland Gold Mining Co.*, *supra*, was an action to determine title to certain mining claims, entered under certain laws of the United States.

On page 581 of the opinion, the Court, quoting from *Osborn vs. Bank*, 9 Wheat. 822, says:

"They also allege that the action arises under, and that its determination will involve and require the construction of, the laws of the United States *specifically* enumerated, as well as the preemption laws. They state no facts to show the right they claim, *or to enable the court to see whether it necessarily depends upon the construction of the statutes*. The statutes referred to contain many provisions; but the *particular* provision relied on is nowhere indicated. A cause cannot be removed from a state court simply because in the course of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must *depend* upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation or effect of the Constitution or laws upon the facts involved.

"Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon



the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States."

The above authority holds that it is not sufficient to cite and refer to laws upon which the right is claimed to be based, but that, in addition, such facts must be alleged so as "to enable the court to see whether it necessarily depends upon the construction of the statutes." Also, if a statute referred to contains many provisions, the *particular* provision relied on must be indicated.

In the case of *Shulthis vs. McDougall*, *supra*, the court, referring to the fact that the plaintiff had not specifically set forth in his bill certain statutes relied upon to sustain his claim, upon page 570, says:

"True, it contains enough to indicate that those statutes constitute the source of the complainant's title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left *unstated and uncertain*."



It appears, therefore, from the foregoing cases, that it is not sufficient for the plaintiff in his bill to allege, in general terms, that the suit arises under the Constitution and the laws of the United States; that it is not sufficient for him to cite and refer to laws and statutes, however numerous, under which the claim is asserted, but that plaintiff in his bill must, by clear and positive assertions, show how the right asserted, not only grows out of, but is dependent upon, the construction of the laws referred to, and that such statements must be made in such manner as to enable the court to see, by inspection of the bill, that the right asserted is dependent upon the laws and statutes relied upon, and that where such laws, or statutes, contain numerous provisions, the *particular* provision relied upon must be pointed out.

We come, then, to a consideration of the laws and statutes, referred to in the bill, in order to ascertain whether any federal question has been *stated*.

In the preceding cases which we have cited, the courts have frequently held that a federal question *might* have been stated, but that the pleader had failed to do so, by reason of his failure to clearly show that he *intended* to rely upon the provision of the Constitution, or statute, referred to, or by his failure to so connect the right relied



upon with the statute or law referred to, that the court would be unable to see that the right or title asserted was dependent upon the construction of the law referred to.

Thus failure of jurisdiction might result alone from deficient *pleading*, or indefinite and uncertain statements in the bill.

We propose, first, to examine the laws and statutes, referred to in the bill, from this standpoint of pleading, and,

Second, to consider them, from what might be termed the *substantive* standpoint; that is, whether the right asserted is simply a question of local, or general law, or is dependent upon and can be ascertained only by construction of the laws and statutes referred to in the bill, and conceding that they have been properly plead.

In considering this question from either of these standpoints, it must always be borne in mind that these statutes and laws cannot be considered in the abstract, for the purpose of determining whether a federal question has been raised, but only in connection with, and as they bear upon and affect, the ultimate right asserted by the plaintiff, as dependent upon the construction of such laws.

That ultimate right, as we have heretofore seen, is not the right of the plaintiff to extend his



riparian rights out to the *natural* channel in front of his lands, but to extend out to an artificial channel, dredged out by the government, and including the right to use and occupy an island already occupied and used as a habitation by another.

In other words, the purpose of the bill is to establish the southern boundary line of plaintiff's estate.

The first five paragraphs of the bill are devoted entirely to statements as to the citizenship of the parties, the value of the matter in dispute, and a description of the patented premises owned by the plaintiff and the defendants, respectively.

The sixth paragraph of the bill refers to "the ordinance of 1787," and quotes that portion of Article IV of the Ordinance which provides that the navigable waters leading into the Mississippi and St. Lawrence Rivers shall ever remain free as common highways.

There is no statement in the bill which would enable the court to see that plaintiff's asserted right is dependent upon a construction of the "Ordinance," and it is apparent from an examination of that portion of the "Ordinance," quoted in the bill, that the question as to whether plaintiff had the right to extend out to any artificial channel that might be dug in the body of water in question,



could not depend upon a construction of the language quoted.

In the same paragraph, the bill refers to the act of Congress passed May 18th, 1796, providing for the sale of lands in the territory northwest of the Ohio River, and quotes from section nine of said Act.

“That all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be and remain public highways.”

This Act is subject to the same remarks, as made above, in regard to the “Ordinance of 1787.”

Further on in paragraph six of the bill, plaintiff refers to the Enabling Act of Congress for the admission of the State of Wisconsin, approved August 6th, 1846, and quotes that part of the Enabling Act, describing the northerly and northwesterly boundary of Wisconsin, as follows:

“Thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the centre of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same above the Indian Village, according to Nicollet’s map; thence due south to the main branch of the St. Croix River.”



All of the statements in the bill, in regard to this Enabling Act and the language quoted from it, are merely made in the form of historical statements. There are no allegations, whatsoever, that plaintiff's asserted right depended upon a construction of the terms of the Act, or any statements which would enable the court to see that the right claimed depended upon an interpretation of the Enabling Act.

In fact, the record affirmatively discloses that the only construction of this Act was at the behest of the defendant.

The plaintiff had alleged in his bill that the body of water, at the *locus in quo*, was an arm, bay or inlet of Lake Superior.

The defendant in his answer alleged that the said body of water was the St. Louis River.

(See Par. 5 of Answer, Record, p. 14.)

In support of this contention, defendant introduced a copy of Nicollet's map, referred to in the Enabling Act.

(See defendant's Exhibit A1.)

This map showed upon its face, and by bare inspection, that the St. Louis River extended to



the natural entry between Minnesota and Wisconsin Points, which was several miles lakeward from the *locus in quo*.

In Judge Morris's opinion, it appears that he considered the body of water in question was the St. Louis River and that he arrived at this conclusion, in part, from an inspection of Nicollet's map, which had been introduced by the defendant.

(Record, p. 120.)

Mr. Washburn did ask the trial court to make a finding as to whether the body of water in question was an arm or bay of Lake Superior, as appears from Judge Morris's opinion, on the same page referred to above.

But the question as to whether this body of water was a bay, or a river, could not be determined by a construction of the *language* of the Enabling Act, referred to above, for the terms of the Enabling Act did not pretend to declare *where the lake ended and the river began*, it simply declared where the boundary line ran between the two States after the river had been reached.

In fact, counsel for plaintiff admitted this, on page 23 of their brief in their application for a writ of certiorari, for, after quoting the terms of the Enabling Acts of both Wisconsin and Minne-



sota, defining the boundary line between the two States, counsel, in referring to these acts, say:

*"There was no mention made of the bays at or forming the head of Lake Superior, no definite point fixed where the river ends and the lake begins."*

It is apparent, therefore, that no construction of the *terms* of the Enabling Act could determine whether the body of water in question was a bay, or river. It is true that an inspection of Nicollet's map, referred to in the Act, does reveal the fact that it is a river. But, manifestly, plaintiff did not rely on Nicollet's map, for he did not introduce it, but the defendant did.

There is nothing in the terms of the Enabling Act, therefore, nor any statements in the bill, showing that the rights of the plaintiff were dependent upon the construction of this Act.

In paragraph 11 of the bill, at the top of page 7 of the Record, it is alleged:

*"That in the preservation of public rights on such navigable waters, where the same constitute State boundaries, it was the intent of the Federal Government and of the States to forever maintain and preserve the rights of the respective States and the citizens thereof, to have access to the navigable and navigated channels of such boundary waters."*



What counsel mean to assert is that it was the *intent and has been the general policy* of the Government and the States to permit the citizens of the several States to have access, not only to the *natural, navigable* channel, but to the *navigated, artificial* channels of boundary streams, and this regardless of the fact as to whether he still has access to the *natural, navigable channel*, or as to whether the *artificial, navigated* channel, may be located in another state, or as to whether in reaching out to this artificial, navigable channel he may go over and appropriate to his use an island, located in another state, and the title to which, according to the laws of that other state, has vested in another.

In other words, counsel lay it down as a proposition, without any qualifications, that it is the general policy of the law to permit any shore owner, in boundary waters, to extend out to any navigated channel, whether artificial, or natural, and to take and appropriate to his own use all property lying between his shore lands and the navigated channel, whether natural or artificial.

But conceding this to be so, it does not raise any question of federal jurisdiction.

Counsel does not cite any provision of the Constitution, or any treaty or law of the United States which grants any such right. And the au-



thorities which we have heretofore cited universally hold that, in order for a party to bring himself within the jurisdictional clauses, he must cite some provision of the Constitution, treaty or law of the United States, upon which he relies to support his asserted right, and not upon a question of general law, or matter of public policy.

In paragraph 16 of the bill, (Record, page 8), it is alleged that, under the Act of Congress of September 19, 1890, the War Department established dock lines in the waters, at the *locus in quo*; that said dock line upon the Minnesota side extended *through* said Tallas Island, and that on the Wisconsin side the dock line was some distance to the south of said island, and alleges said dock lines were approved December 5, 1894.

In paragraph 17 of the bill, (Record, page 8) it is alleged that under the Acts of Congress of July 13, 1892, June 3, 1896 and March 3, 1899, the War Department made a careful survey of the waters, at the *locus in quo*, and *re-established* dock lines through the same upon both the Minnesota and Wisconsin sides, *the same being at some points nearer and at some points further from the respective shore lines than the dock lines previously established.*

In paragraph 18 of the bill, (Record, page 8) it is alleged that the map and survey of such



dock lines, and the proposed improvement thereunder, were approved by the War Department on the 17th day of November 1899, and it is alleged in the bill that the said dock line on the Minnesota side extended *through* the said Tallas Island, and likewise the improved channel.

In reference to the various Acts of Congress, mentioned and referred to in the bill of complaint, on page 8 of the Record, there is no *statement* showing the particular provisions in such acts upon which plaintiff relies upon, no logical and affirmative statements showing how the right asserted is dependent upon the construction of any of such laws, and no statement by which the court can clearly see that the final result is dependent upon the construction of such laws. In fact, the bill contains a mere *recitation* of these laws, without any statement of facts showing that plaintiff's asserted right is dependent upon their construction.

These laws undoubtedly contain numerous provisions, but no portion of these many statutes are set forth, in fact, no statement is even made in the bill as to where these many statutes can be found, except by reference to the dates of their passage.

They come within the doctrine laid down in



the case of *Blackburn vs. Portland Gold Mining Company, supra*, wherein the court says:

“They also allege that the action arises under, and that its determination will involve and require the construction of the laws of the United States *specifically* enumerated, as well as the preemption laws. They state no facts to show the right they claim, *or to enable the court to see whether it necessarily depends upon the construction of the statutes.*

“The statutes referred to contain many provisions; but the *particular* provision relied on is nowhere indicated.”

We contend, therefore, that there are no sufficient statements of fact in the bill, connecting plaintiff's asserted right with the provisions of the acts specified, to enable the court to see, on the face of the bill, that the right asserted is dependent upon the construction of the statutes referred to.

We contend further that the right asserted by plaintiff does not, and could not, depend upon the construction of the statutes mentioned on page 8 of the Record, within the meaning of the jurisdictional clauses.

It appears, upon the face of the bill, that the general nature of these Acts of Congress is to authorize the War Department to lay out dock lines,



improve channels, and to make appropriations for such improvements.

Counsel's theory undoubtedly is, that when the Government has laid out dock lines, and has dredged an artificial channel within those lines, that the shore owners, opposite said dock lines, have a right to go out to said artificial channel in a straight line, and this without regard to the question as to whether in so doing they appropriate property, the title to which has already vested in another.

But let us assume, for the sake of the argument, that, when the Government dredges an artificial channel, the opposite shore owner has the right to go out to said channel. This right does not depend upon a *construction of the terms of the statute itself*, authorizing the construction of the channel, but if the shore owner has such right, under all circumstances, which we deny, the right arises *as a legal effect* from the dredging of the channel, and not from any construction of the law itself.

In other words, the right, if it exists, arises out of local, or general principles of law, and these are not reviewable by this court on appeal.

The bill nowhere states that any such right as plaintiff asserts is given, or pretended to be given, by any of the statutes referred to. In fact,



the bill itself states that the purport of these acts is merely :

1. To authorize the War Department to lay out dock lines.
2. To dredge out channels within those lines.
3. To make appropriations for such improvements.

How can it be claimed that the right asserted by plaintiff is dependent upon the construction of such Acts of Congress?

If such right exists at all, the most that can be said is that the right has its *origin* in such laws, and not because it arises out of any necessity of construing the law itself.

But this court has decided, in the cases which we have cited above, that where the United States has granted patents, either under the public land laws, or mining laws, that disputes arising, thereafter, over the title to such lands, does not raise a Federal question, merely because the title had its *origin* in the laws of the United States.

Furthermore, it is well known that, when Congress passes an act, authorizing the War Department to lay out dock lines and dredge channels, it does not have in mind, or contemplate,



that such action should in any way affect, or change natural property rights. In fact Congress would have no power to do so.

In *Gould on Waters*, Sec. 138, the author says:

“The mere establishment of harbor or dock lines does not change rights of property.”

We contend, therefore, that there is no statement of facts contained in the bill which shows that plaintiff's asserted right is so connected, with the statutes in question, that his right is dependent upon a construction of such statutes.

We contend, that it appears from the statements in the bill, as to the character, nature and *purpose* of said statutes, that plaintiff's right could not depend upon the construction of said statutes.

The end sought to be obtained in this suit, as clearly appears from the bill, was to establish the boundary line between plaintiff's and defendant's riparian rights. This is manifest not only from the bill, but from Plaintiff's Brief, for, on page 103 of their Brief in this court, they say:

“The plaintiff brought this suit to have the extent of his riparian rights determined



and to restrain the defendants from interference therewith."

This action, then, is merely one to determine private property right, and to fix the boundary line between two estates. It does not raise any question of Federal, but only of local and general law.

The statutes of the United States provide for the manner of surveying and patenting lands belonging to the public domain.

If, after the patents had been issued for lands, disputes should arise over the establishment of the boundary lines between two tracts, no one would contend that the question could be reviewed in this court, notwithstanding the fact that the rights asserted grew out of statutes of the United States.

On what principle of law can it be maintained that a case involving the question of the boundary line between riparian estates can be reviewed by this court, and such question as to uplands cannot?

This court has held in numerous cases that *the title* to all islands, lying between the shore lands and the mid channel of the stream, and all riparian rights incident to the shore lands, vested



in the owner of the shore lands, *by virtue of his patent to the upland.*

Grand Rapids & Ind. Ry. vs. Butler,  
159 U. S. 87.

Whitaker vs. McBride, 197 U. S.  
510.

United States vs. Chandler-Dunbar  
Water Power Co., 209 U. S. 447.

Now if a dispute over the boundary, or title, to upland, granted by patent of the United States, cannot be reviewed in this court, upon what theory can a suit, involving the boundary, or title, to riparian rights property be reviewed, especially as this court has declared that the title to the riparian property *passes by virtue of the title to the upland?*

A careful analysis of the bill of complaint will show that the plaintiff relied upon two points:

1. That the body of water at the *locus in quo* was an arm of Lake Superior and not a river.

2. That the dredging of the artificial channel gave the plaintiff the absolute right to wharf out and fill in to this channel, and this regardless of the question as to whether in so doing he interfered with, or appropriated to his own use the said island, the title to which had already vested in another.



On the first question, as to whether the body of water, at the *locus in quo*, was a river, or an arm, or bay, of Lake Superior, suppose counsels' contention that it is an arm of Lake Superior be accepted, how does this bring him within the jurisdictional clauses, so as to permit that question to be reviewed by this court?

In order to raise a Federal question, which counsel admit must exist in order to give this court jurisdiction, some provision of the Constitution, treaty or laws of the United States must be so involved, that the final result is dependent upon their construction.

What provision of the Constitution, or of a law or treaty have counsel pointed out in their bill, upon the construction of which depends the question as to whether the body of water, at the *locus in quo*, is a river or an arm of Lake Superior?

The question as to whether a particular body of water is a bay, or a river, is largely a question of fact, and is to be determined by evidence of what the *characteristics* of the body of water are.

This is made apparent by the fact that counsel for plaintiff introduced a large amount of testimony to show what the character of this body of water was, and asked the trial court to make a finding of fact as to whether it was a river, or



a bay of Lake Superior. (Record, p. 120). And the trial court found, (Record, page 120), that it was a river, and the Circuit Court of Appeals affirmed the finding of the trial court. (Record, p. 151).

That the question of whether the body of water in question was a bay, or river, is not dependent upon the construction of any provision of the Constitution, law, or treaty of the United States, is further made apparent by an examination of counsels' brief in this court.

Their treatment of this subject is contained in Chapter V of their brief, pages 71 to 90. It consists of a review of the evidence, as to the characteristics of these waters, a citation of authorities to uphold their contention, every one of which are decisions by state courts, and ask this court to reverse the findings of both the trial court and the Circuit Court of Appeals, on the strength of the testimony offered, and the weight of the authorities cited. But in the entire chapter there is no reference to a single provision of the Constitution, or a law, or treaty, upon the construction of which the determination of this question depends.

It is a significant fact that, although counsel devoted twenty pages of their brief to a discussion of this question, they never referred to a



single provision of the Constitution, or a law, or treaty, as affecting such question, but presented the question to this court for decision upon the merits, and without regard to the fact that this court could only review such question upon the ground that a Federal question was involved.

We contend, therefore, that upon the question as to whether or not the body of water, at the *locus in quo*, is a river or an arm of the lake, there is no statement in the bill that such question is dependent upon the construction of any provision of the Constitution, law, or treaty, and further that it is, as a matter of fact, a question of local, or general, law, and therefore, not reviewable by this court.

On the second question raised by the bill, that the plaintiff had the absolute right to go to the artificial channel, we have already shown that this question was not dependent upon the construction of any law of the United States, and shall not burden the court with a repetition of the argument on this point.

As further proof of the fact that the only questions raised by the plaintiff in his bill were the questions of whether the body of water, at the *locus in quo*, was an arm of Lake Superior, or the St. Louis River, and the question as to whether the plaintiff had the absolute right to



extend out to the artificial channel, we desire to call attention to the decisions of both the Circuit Court and the Circuit Court of Appeals as bearing out our contention that these were the only questions presented to those courts for decision.

While we recognize the fact that, generally speaking, the question as to whether or not the plaintiff has presented a Federal question for decision is to be determined by an examination of the allegations of the bill itself, nevertheless, it is a fair presumption that, if counsel has presented such questions and has insistently argued to the court that such rights were based upon numerous laws and statutes, referred to in the bill, that the courts in their decisions would *at least refer to the laws and statutes relied upon* as sustaining the right claimed.

And yet the fact remains that neither the Circuit Court, which decided in plaintiff's favor, nor the Circuit Court of Appeals, which reversed the lower court, decided the case upon any law or statute set forth in plaintiff's bill, but only passed upon and decided the case upon the two questions which we have heretofore asserted were raised by the bill, to-wit, the question as to whether the body of water, at the *locus in quo*, was an arm of Lake Superior, or the St. Louis River, and the question as to whether the plaintiff had the absolute right



to extend out to the said artificial channel; neither of which questions, as we have heretofore shown, raised any question dependent upon the construction of any law of the United States.

Judge Morris in his decision held that the body of water in question was the St. Louis River, and not a bay of Lake Superior, as contended for by the plaintiff, and he further held that, *prior* to the construction of the artificial channel, the said island was in Wisconsin, and the right and title to said island was in the defendant, Whiteside, and that plaintiff had no right or title thereto. But he further held that when the artificial channel was dredged out on the south side of said island, such act shifted the boundary line of the state to the south of said island, and transferred the title, theretofore held by defendant Whiteside, to the plaintiff, Norton. But he did not hold that such result was arrived at by the construction of any law, or statute of the United States, but that he arrived at such conclusion "Under the principles of the decisions and the reasoning thereof." (Record, p. 123).

It further appears from the decision of the Circuit Court of Appeals that that court did not discuss or consider the effect of any of the statutes or laws, referred to in the bill, but decided the case upon the two questions which we have stated



were raised by and relied upon by the plaintiff, the question as to whether the body of water in question was the St. Louis River, or a bay of Lake Superior, and the further question as to whether the plaintiff had the absolute right to extend to the artificial channel.

The latter court agreed with Judge Morris on the point that the waters in question were a part of the St. Louis River, but differed with him on the question that the dredging of said artificial channel could shift the boundary line of the State of Wisconsin from the north to the south side of said island, and could transfer the right and title to said island, which had theretofore been in the defendant, Whiteside, to the plaintiff, Norton.

Thus we see that although plaintiff has mentioned ten or more different acts of Congress in his bill, neither the Circuit Court, deciding in his favor, or the Circuit Court of Appeals, deciding against him, has mentioned or discussed a single law or statute pointed out in the bill.

It is true that both of said courts did, in their decisions refer to Nicollet's map, and Nicollet's map is referred to in that portion of plaintiff's bill wherein he sets forth a portion of the Enabling Act, admitting the State of Wisconsin.

But, as we have heretofore shown, neither of said courts construed the terms of the Enabling



Act, but simply held that an inspection of the map showed that the waters, at the *locus in quo*, were waters of the St. Louis River and not a bay or inlet of Lake Superior.

The plaintiff, as has been shown, contended that these waters were a bay, or inlet, of Lake Superior. The defendant maintained that the waters, at the *locus in quo*, were waters of the St. Louis River, and introduced Nicollet's map as a part of their proof on this question.

Thus we see, in so far as it can be held that the terms of the Enabling Act were construed at all, it was at the behest of the defendant and not of the plaintiff.

It is apparent, therefore, that neither of these courts, in rendering their decisions, referred to, discussed, or considered a single act set forth in plaintiff's bill.

It further appears that, not only did both of these courts refrain from mentioning, or discussing the effect of any of these acts, but that the decisions of both courts are confined to the consideration of two questions, neither of which raise a Federal question; first, the question as to whether or not the waters, at the *locus in quo*, are a bay, or inlet, of Lake Superior; and, second, the question as to whether a shore owner may extend out to any artificial channel that may be dug in front of his



premises, without regard as to whether it may *increase* his *natural* riparian property rights, or *decrease* his neighbor's *natural* property rights.

We do not say that, if the plaintiff had clearly set forth Federal questions in his bill, *and had earnestly relied upon, and asserted them in his arguments*, that the mere failure of the courts to pass upon such questions would defeat jurisdiction. But we do contend that, if such questions were earnestly relied upon and presented, it is a most singular circumstance that both the Circuit Court and the Circuit Court of Appeals should have entirely ignored the consideration, or discussion, of the effect of the many statutes, apparently relied upon by the plaintiff, as to the right asserted by him.

Conceding as the plaintiff does, that the *ultimate* right which he seeks to obtain in this suit is the determination of his riparian rights, it is difficult to understand how the determination of that question, within the meaning of the jurisdiction clauses, *could depend* upon the construction of any provision of the Constitution, or a law, or a treaty of the United States, for the question as to all of the fundamental rights of a riparian owner, the extent and nature of his title, his right of access, and the manner of approach to the channel, by the extensions of the side lines of his uplands—



these are questions that were definitely fixed and determined, *long prior to the adoption of the Constitution, and long prior to the passage of any laws of the United States.*

It follows, therefore, that the question here sought to be determined is a question, determinable by the application of the principles of general law, and no Federal question is raised, *unless some specific provision of the Constitution, or of a law, or treaty of the United States, can be pointed out which has altered or changed these principles of general law.*

We contend therefore:

1. That the plaintiff has failed to *state* a Federal question in his bill. That there is no clear and definite statement of facts, connecting the right, with any *specific* provision of the Constitution, or a law, or treaty of the United States, so as to enable the court to see that the right asserted is *dependent* upon the construction of any of the provisions cited.

2. We contend that an inspection of the bill, and a consideration of the nature and character of the laws and statutes cited therein, show that the right asserted *could not depend upon the construction of such laws, or statutes.*



3. We contend, as this court has frequently decided, that the determination of the question of a shore owner's riparian rights is purely a question of *local* law, and does not involve questions of Federal jurisdiction.

For the foregoing reasons, we respectfully submit that the appeal should be dismissed.

## **PART II.**

### **THE CASE ON ITS MERITS.**

If this Court should hold that the question of jurisdiction which we have raised in the preceding chapter is untenable, we, nevertheless, contend that the decision of the Circuit Court of Appeals should be affirmed on the merits of the case. But, before proceeding to discuss this question, we desire, briefly, to outline the positions of the respective parties to the suit.

The plaintiff relies mainly upon the following contentions:



1. That the body of water, separating the lands of the plaintiff and defendant, is a bay or lake, and that the boundary line between the States of Wisconsin and Minnesota runs through the middle of said body of water; and, as the Tallas Island, which plaintiff seeks to recover, is north of this boundary line, he is entitled to the use and possession of said island.

2. Plaintiff contends that, if it be conceded that the said body of water is a part of the St. Louis River, and if it be conceded that the original, *natural* channel of the stream, and the boundary line between the two States, ran on the *north* side of the said Tallas Island, that, nevertheless, the dredging of the artificial channel by the government, *south* of said Tallas Island, shifted the boundary line between the two States, from the old, *natural* channel to the new artificial channel, and also deprived the defendant of any right, title, or interest which he might, theretofore, have had in said Tallas Island, and, by operation of law, transferred such right, title, or interest to the plaintiff.

The defendant, on the other hand, stands upon the following propositions:

*First.* That the Circuit Court had no jur-



isdiction. This contention is based upon two propositions:

(a) That the body of water, separating the lands of the plaintiff and defendant is the St. Louis River, and that, as the terms of the enabling act admitting the State of Wisconsin defined the boundary line between the two States to be the middle of the *main channel* of the St. Louis River, and as the main channel of said river intervenes between the lands of plaintiff and the said Tallas Island, which he seeks to recover, the said island is, therefore, in the State of Wisconsin, and the Minnesota court had no jurisdiction.

(b) Defendant further contends that, even if it be conceded that the body of water, separating the lands of plaintiff and defendant, is not the St. Louis River, but is an arm or bay of Lake Superior, that, nevertheless, the boundary line between the two States is the middle of the *main channel*, and not the middle of the body of water itself, and this upon the ground that it is a universal principle of law that, where a stream forms the boundary line between two states, the middle of the *main channel* constitutes the boundary line, and this doctrine applies to



bays, sounds, or arms of a lake, as well as to rivers.

Applying this doctrine to the *locus in quo*, the boundary line between the two States is the middle of the *main channel* of the body of water separating them.

As the middle of the main channel of this body of water is *north* of the said Tallas Island, it follows that said island is in the State of Wisconsin, and the Minnesota Court had no jurisdiction, even if it be conceded that the body of water in question is an arm of Lake Superior, and is not a part of the St. Louis River.

*Second.* The defendant contends that the dredging of the said artificial channel by the government could not effect a change in the boundary line between the States, and could not operate to automatically transfer private property rights from one individual to another. We contend that Congress itself has no power to change the boundary line between states, much less an administrative department without the consent of the states affected.

We further contend that, when the boundary line between two states has once been fixed, the only way it can be changed is by mutual agreement between the states, with the consent



of Congress, or by gradual and imperceptible changes, brought about by *natural* causes, and that any change effected instantaneously, or suddenly, whether brought about by natural causes, or by human agency, cannot in any way affect the boundary line, as between states, or private property interests, as between individuals.

*Third.* We contend that, under the decisions of this court, where the United States makes a grant of lands, bordering on navigable streams, the question as to the nature and extent of the title of the shore owner in the bed of the stream, and to islands forming thereon, is governed *solely* by the law of the state where the lands are located; and as the said Tallas Island has been shown to be in Wisconsin, the question as to who has the right, title and use thereof must be determined by the laws of that State.

*Fourth.* We contend that, under the law of the State of Wisconsin, where a stream forms the boundary line of the State, the shore owner takes the title in the bed of the stream to the middle of the main channel, subject merely to the right of public navigation.

*Fifth.* We contend that, under the laws of



the State of Wisconsin, the shore owner takes the *absolute title* to all *islands* lying between the shore line and the thread of the stream, and this title is superior to a subsequent survey and grant by the government itself.

*Sixth.* We contend that even in those states where it has been held that the title of the shore owner only extends to low water mark, that the law is that the title to all *islands*, lying between the shore line and the thread of the stream, vests *absolutely* in the adjoining shore owner.

*Seventh.* We contend that, as the said Tal-las Island is in the State of Wisconsin; that as, under the laws of that State, which are controlling, the *absolute title* to the said island vested in the defendant, long prior to the time when said artificial channel was dredged, that even if the dredging of that channel should be held to have shifted the boundary line of the State, that it could not deprive the defendant of property, the title to which had already vested in him; for to so hold would violate the provisions of the Fifth and Fourteenth Amendments of the Federal Constitution.

While there are many subsidiary questions



that will arise in the consideration of this case, the above is a brief outline of the main questions involved.

We come, then, to a consideration of the question as to whether the Circuit Court had jurisdiction.

**The Circuit Court of Minnesota Had No Jurisdiction.**

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We contend here, as we contended in the courts below, that the Circuit Court was without jurisdiction, for the reason that the said Tal-las Island, which the plaintiff seeks to recover, is in the State of Wisconsin.

That the said island is in the State of Wisconsin is made manifest by the following considerations.

The body of water separating the lands of plaintiff and defendant is the St. Louis River.

By the terms of the enabling act, admitting the State of Wisconsin, the boundary line between the two States was declared to be the middle of the *main channel* of the St. Louis River, and by the main channel Congress must have meant the main, *natural* channel *as it existed at the time of the passage of the enabling act.*



The main channel of the body of water, at the *locus in quo*, as is shown by plaintiff's own Exhibits 6 and 9, is *north* of the said Tallas Island, and intervenes between plaintiff's lands and the said island.

If, therefore, the said body of water is the St. Louis River, it follows as a matter of course that the said island is in the State of Wisconsin.

The question, then, recurs, is the body of water, at the *locus in quo*, a part of the St. Louis River? We contend that it is. The plaintiff contends it is an arm of Lake Superior.

The said enabling act contained the following clause:

"Thence up the *main channel* of said river to the first rapids in the same above the Indian Village, according to Nicollet's map."

The defendant introduced Nicollet's map in evidence, Exhibit A 1, and a bare inspection of this map shows that *all* the waters behind and westerly of Minnesota Point were marked by a line, indicating a river, and this line is labelled on the map itself as the "St. Louis River."

Congress certainly had the power to fix



the boundary line between the two States. By its reference to Nicollet's map, in the enabling act, Congress legislatively determined that the waters, behind and westerly of Minnesota Point, were the St. Louis River. For the purpose, therefore, of determining where the boundary line is, the body of water, at the *locus in quo*, must be considered as a river, even though it should possess more of the natural characteristics of a lake, bay or sound.

The Circuit Court, which decided this case in favor of the plaintiff, while it held that it was not necessary to pass directly on the question as to whether the body of water in question was a lake, or river, nevertheless stated that, in his opinion, the evidence clearly showed that not only was the body of water at the *locus in quo* a part of the St. Louis River, but that all the waters clear down to the natural entry between Minnesota and Wisconsin Points were the St. Louis River.

In his decision, Judge Morris says:

"Mr. Washburn in his argument has expressed a desire that I make a finding on the question of fact as to whether or not the waters here involved, lying between the shore line of the plaintiff on the one side and of defendants Whiteside and Alexander



on the other, are waters of a bay, or arm, of Lake Superior, or waters of the St. Louis River.

"I do not think it necessary to do this, because, in my view, the result must be the same in either case. *But I will say that it seems to me that the river certainly extends to a point below the waters here involved.* And indeed, although those waters are designated on the maps of the Government surveys as "St. Louis Bay," yet in view of language used in the Enabling Act as to the northerly and northwesterly boundary of the State of Wisconsin, and in view of the map therein referred to (Nicollet's map), a copy of which is here in evidence, I would feel obliged to find that the St. Louis River extends to what is commonly known as the 'Wisconsin entry', between Minnesota Point and Wisconsin Point, and that its mouth is there." (Record, fol. 148.)

As the Circuit Court of Appeals, at (c) on page 152 of the Record, in referring to this matter, says:

"The trial court, upon the facts and with an intimate personal knowledge of the locality, so held, *and great weight should be given to this finding of the chancellor.*"

The Circuit Court of Appeals was also of the opinion that the body of water in question was



the St. Louis River, and gives its reasons at great length on pages 151 and 152 of the Record.

Counsel rely mainly upon what they term the *natural characteristics* of this body of water to be to establish their premise that it is an arm of Lake Superior, and not the St. Louis River.

But if Congress, by its reference to Nicollet's map in the enabling act, has legislatively determined that the body of water in question must be considered as the St. Louis River, for the purpose of determining the boundary line, then, so far as the question now under consideration is concerned, it makes no difference whether the *natural characteristics* of the body of water are those of a bay, lake, or river.

As the Circuit Court of Appeals says, on page 151 of the Record, if Congress, by its reference to Nicollet's map designated this body of water as the St. Louis River, then, by the very terms of the enabling act, the middle of the main channel became a "natural monument" in describing the boundary of the new State.

But we contend that the body of water in question, considered from the standpoint of its natural characteristics, is the St. Louis River, and not an arm of Lake Superior.

Counsel, to sustain their view that the waters



in question are an arm of the lake, cited in the courts below, the following cases:

Ainsworth vs. Munoskong, 123 N. W.  
802.

Bode vs. Shooting Club, 57 Ohio St.  
226.

People vs. Featherby, 12 N. Y. S.  
389.

An examination of those cases will show that the physical characteristics of the waters involved were essentially different from those in the case at bar.

In the cases of *Ainsworth vs. Munoskong*, *supra*, and *Bode vs. Shooting Club*, *supra*, the waters of the river flowing into the bay, or lake, *opened into the bay, or lake at full width of the river*; there was no natural barrier which separated the two bodies of water, and which enabled one to determine just where the river ended and the bay or lake began.

In the case of *People vs. Featherby*, *supra*, it is true that the two bodies of water were separated by a narrow point of land. But this point of land was only from three to ten rods wide, was low and marshy, and when the winds



were from the lake the waters of the lake would break through and over the point into the bay.

On the other hand, the waters behind Minnesota Point, which counsel designate as an arm of Lake Superior, are absolutely land locked and separated from the lake by Minnesota Point, and the only connection between the two bodies of water is the natural entry between Minnesota Point and Wisconsin Point, and this entry, according to plaintiff's own witness, Pearson, is only about 150 feet wide. (Record, fol. 105.)

According to plaintiff's own witness, Pearson, Minnesota Point is from 300 to 1500 feet in width; (Record, fol.94); and according to plaintiff's witness, Merritt, the point has been in existence beyond the memory of man, was covered by a growth of trees almost its entire length, from 75 to 80 feet in height; has been inhabited for the past 50 or 60 years, and there is no place in the entire seven miles of its length where the lake ever broke over the point and formed a permanent connection with the waters behind the point. (Record, fol. 55-58.)

In addition to the foregoing, the evidence in this case shows that the body of water behind or westerly from, Minnesota Point has the natural characteristics of a river.



*Webster* defines a river as follows:

"A large stream of water flowing in a *channel* toward the ocean, a lake, or another river."

In *Black's Law Dictionary*, a river is defined as follows:

"A natural stream of water, of greater volume than a creek or rivulet, flowing in a more or less permanent bed or channel, between defined banks or walls, with a current which may be either continuous in one direction, or affected by the ebb and flow of the tide."

The chief characteristic, therefore, which distinguishes a river, from a lake or bay, is that a river has a well defined *channel* and current.

Applying this test to the waters behind, or westerly, of Minnesota Point, we find that this body of water is a river, for the evidence introduced by the plaintiff himself shows that this body of water has always had a well defined *channel*, and that this channel is very much deeper than the average depth of water in the stream.

Plaintiff's Exhibits 6 and 9, which are government maps, show that there is a well defined channel in this stream from Fond du Lac to the



natural entry, with the exception for a slight distance in the westerly portion of St. Louis Bay, and they show that the depth of the natural channel is from fifteen to thirty feet, while the waters outside of the channel are only from four to ten feet in depth.

The plaintiff's witness, Merritt, testified that there has always been a well defined current and channel from the village of Fond du Lac down to Lake Superior. (Record, fol. 57.)

The plaintiff's witness Darling, the assistant government engineer at Duluth, and who has for fifteen or twenty years made a scientific study of these waters, testified that there is a well defined channel all the way from Fond du Lac to Grassy Point; (Record, fol. 84); and this same witness testifies that the body of water in question, from Fond du Lac to Grassy Point, has more the appearance of a river than a lake or bay, (Record, fol. 74), and Grassy Point is two miles lakeward from the *locus in quo*.

We have shown, therefore, that, by the reference to Nicollet's map, Congress treated this body of water as the St. Louis River; that both the Circuit Court and the Circuit Court of Appeals considered it to be the St. Louis River; that, by its natural characteristics and surroundings, it is a river; and, finally, that some of



plaintiff's own witnesses have testified it was a river, and others have testified that it had the characteristics of a river, to-wit, a well defined current and channel.

If this body of water is the St. Louis River, and as it is conceded that it has, and has had, a well defined channel, then all that it is necessary to do to determine where the boundary line between the two States is, is to apply the language of the enabling act, which says the boundary line shall be the middle of the *main channel*. to the *locus in quo*.

This application would throw the boundary line on the north side of the said Tallas Island, and would leave that island in Wisconsin, and from this it follows that the Minnesota court had no jurisdiction of the subject matter of the action.

Again, the defendant contends that, even if this body of water be conceded to be an arm of Lake Superior, the middle of the *main channel* of this stream is the boundary line between the two States, and if that be so, as we have heretofore seen, the Tallas Island is in the State of Wisconsin.



**Where a Stream of Water Forms the Boundary Line Between Two States, It is the Universal Policy of the Law to Adopt the Middle of the Main Channel as the Boundary Line, and this Applies to Sounds, Bays, and Arms of the Sea as Well as to Rivers.**

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The doctrine stated above is a principle of universal law, local as well as international, and has been adopted by the courts of last resort in this country.

Louisiana vs. Mississippi, 202 U. S.  
1. 50 L. Ed. 913.

1 Halleck, International Law, Chap.  
6, p. 146.

Creasy, International Law, p. 221,  
No. 230.

The case of *Louisiana vs. Mississippi*, *supra*, arose over a dispute as to the boundary line between the two States.

It appears from the statement of the case that the case was an

“original suit in equity to settle a disputed boundary line between the states of Mississippi and Louisiana in the waters of Lake Borgne and Mississippi Sound. Boundary decreed as being the deepest *water channel* sailing line emerging from the most eastern mouth of Pearl River into Lake



Borgne, and extending through the northeast corner of Lake Borgne, thence east and south through Mississippi Sound, through south pass to the Gulf of Mexico."

A part of the enabling act admitting Louisiana reads as follows:

"Thence along the said parallel of latitude to the River Mississippi; thence down the said river to the River Iberville, and from thence along the *middle* of said river and Lakes Maurepas and Ponchartrain to the Gulf of Mexico."

It will be noticed that the enabling act provided that the boundary line of the State should run through the *middle* of these bodies of water, the river, lakes and sounds. The question was squarely before the court for decision, therefore, as to whether the *middle* of these various bodies of water meant the middle of the waters, measured from shore to shore, or the middle of the main channel.

It will also be observed by reference to the plats, printed in the lawyers' edition of said case, that the Lakes Ponchartrain and Borgne, and Mississippi Sound, especially the latter, are virtually parts of the Gulf of Mexico and open directly into the Gulf.



The question was squarely before the court, therefore, whether the doctrine of the "Thalweg" was applicable to lakes and arms of the sea, as well as to rivers proper.

On page 49 of the opinion, the court says:

"Pearl river flows into Lake Borgne, Lake Borgne into Mississippi Sound, and Mississippi Sound into the open Gulf of Mexico.

"If the doctrine of the Thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters *is the deep water channel.*"

The court then refers to the case of *Iowa vs. Illinois*, 147 U. S., 1, where the doctrine of the Thalweg was applied to the Mississippi River, the enabling act of Illinois defining the boundary line between that State and the State of Iowa as the middle of the river, and not as the middle of the main channel.

The court in its opinion, in the case of *Louisiana vs. Mississippi*, *supra*, referring to the decision in the case of *Iowa vs. Illinois*, said:

"This judgment related to navigable rivers. But we are of the opinion that, on occasion, the principle of the Thalweg is applicable, in respect of water boundaries, to



sounds, bays, gulfs, estuaries, and other arms of the sea.

“As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the *middle*, and this is true of narrow straits separating the lands of two different States; *but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the Thalweg applies.*”

As we have heretofore shown, by the government maps and plats introduced by the plaintiff himself, and by his own witnesses, that there is, and always has been, a well defined channel in this body of water behind, or westerly of Minnesota Point, under the doctrine laid down by the authorities cited above, the boundary line between the two States, at the *locus in quo*, is the middle of the main channel, even if it be conceded that this body of water is an arm of Lake Superior.

If this be so then the said Tallas Island is on the Wisconsin side of the stream, and the Minnesota court was without jurisdiction.

Even Judge Morris, who decided this case in favor of the plaintiff, held that the doctrine of the “Thalweg” applied to the waters, at the *locus in quo*.



In the course of his opinion, after stating that Mr. Washburn had requested him to make a finding as to the character of these waters, and as to whether or not they were waters of Lake Superior, or waters of the St. Louis River, he says:

“But as I have before said, I do not think for the purposes of this case a finding on that question is necessary, because the result, as I view it, must be the same whether these waters are river waters or waters of an arm of Lake Superior. Whatever the *character* of these waters, the boundary line between Wisconsin and Minnesota as defined by this enabling act would, in my opinion, under the decisions read and commented upon by Mr. Harris, follow the main navigable channel between Big Island and the Minnesota shore.” (Record, fol. 148.)

In other words, Judge Morris adopted the reasoning laid down in *Louisiana vs. Mississippi, supra*, and held that the boundary line between the two States was the middle of the main channel of the body of water in question, whether these waters were a river or the arm of a lake.

It appears, therefore, that, in opposition to the contention of plaintiff, Judge Morris held, first, that the body of water in question was the St. Louis River, and not an arm of the lake, and,



second, that the boundary line was the middle of the main channel, even though the body of water be considered as an arm of the lake.

Under each of these holdings the Tallas Island was left on the Wisconsin side of the stream.

How, therefore, did Judge Morris uphold the jurisdiction of his court?

He did so by holding that the dredging of the artificial channel shifted the boundary line between the States from the old, *natural* channel, on the north side of the Tallas island, to the new artificial channel, on the south side of the Tallas island, and that dredging of this new channel transferred whatever right or title the defendant theretofore had to the plaintiff.

The next question for consideration, therefore, is what effect, if any, did the dredging of the new channel have?

**The Dredging of the Artificial Channel by the Government Did Not Shift the Boundary Line Between the States.**

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Judge Morris, in his opinion, says:

“I have no doubt that prior to the making of this improved, or government, channel this land was in Wisconsin, and the question



is, has it by the construction of this improved, or government channel, under the paramount authority of the general government to control these waters and to improve the same, of which there can be no doubt, been transferred from the State of Wisconsin to the State of Minnesota?" (Record, p. 121.)

After discussing what would have been the effect if this change in the channel had been brought about by *natural* causes, the Judge, on the same page, goes on to say:

"I can see no valid or just reason why the same result as to the boundary between the States should not follow from the making of this improved channel as would have followed if the change had been brought about by *natural* causes. So that, I think this question of jurisdiction must be answered in the affirmative."

Judge Morris holds, then, that, originally, the boundary line was *north* of the Tallas Island, and that, at that time, it was in the State of Wisconsin, but that the dredging of the artificial channel, *south* of the Tallas Island, shifted the boundary to the new channel and transferred the island to the State of Minnesota, and it is



upon this point alone that he sustains the jurisdiction of the court.

The defendant, on the other hand contends that, when a boundary line between two States has been definitely fixed, that the only way in which that boundary line can be changed is either by the mutual agreement of the States, or by gradual and imperceptible changes brought about by *natural* causes. We contend further that, even if the change is brought about by natural causes, if the change is instantaneous, or sudden, as, for instance, where a river suddenly leaves its bed and cuts a new channel, or the change is brought about by any human agency, that such a change does not in any way affect the boundary line between States. In support of these doctrines we cite the following cases:

State vs. Bowen, 149 Wis., 203.

Washington vs. Oregon, 211 U. S.  
127.

Nebraska vs. Iowa, 143 U. S. 359.

Missouri vs. Nebraska, 196 U. S. 23.

Missouri vs. Kentucky, 78 U. S. 11.

In the case of *State vs. Bowen, supra*, the question to be determined was, whether the original boundary line, between Minnesota and Wisconsin, had been shifted from the main, *natural*



channel in the Mississippi river, to another place in the same river.

It appears that, prior to 1876, the main channel was, and always had been, east of Minnesota Island.

In 1877, the Milwaukee Railroad Company built a bridge from the Wisconsin shore, over said east channel, to Minnesota Island, and also constructed a dam from the Wisconsin shore, across said east channel, to the head of said Minnesota Island, and that said dam destroyed the old channel and caused a new channel to be formed in the river west of Minnesota Island.

It further appears that the said dam across the old, east channel was constructed *by and with the consent of the War Department of the government of the United States.*

Notwithstanding this state of facts, the Supreme Court of Wisconsin held that the boundary line between the States was still in the old, natural channel, and had not been shifted to the new channel, although the new channel, ever since 1876, *has been the only navigable and navigated channel at that point.*

In the course of the opinion, the court says:

“For the purpose of determining the boundary between States, where that is declared to be the centre line, or thread, or



middle of the main channel of a stream separating them, the conditions existing at the time of their creation govern as to what channel is meant. The *then* main channel, except as it may be changed by erosion or accretion, will forever contain within it the declared boundary line, though not necessarily in the same place at all time."

The case of *Washington vs. Oregon, supra*, was brought to determine the boundary line between the two States, at the mouth of the Columbia river.

There were two channels at the mouth of the river separated by Sand Island. In the acts admitting the States the boundary line between the two was defined as being the middle of the North channel. At the time the States were admitted both channels were practically of the same depth, and both were navigable. In the course of time, the North channel, by the action of the waters, became more or less filled up with sand, and the South channel had become the main navigable and navigated channel.

Under this state of facts, the State of Washington commenced an action against the State of Oregon to have it declared that the middle of the South channel was the boundary line between the two States.



The contention of the State of Washington was based upon the claim that the citizens of that State had the right to go to the main, navigated channel, and as the South channel had become the main, navigated channel that the boundary line should be shifted to the middle of the South channel.

That is substantially the claim that is made by the plaintiff in the case at bar. The old, natural channel is still in front of his premises, but he says the government has dredged out a new, artificial channel, south of the old channel, that the artificial channel is now the main, navigable and navigated channel, and that the boundary line should be shifted to the new channel.

But the court in the case of *Washington vs. Oregon, supra*, rejected this doctrine of the shifting boundary. The opening sentence of the opinion reads:

*"The northern boundary of the State of Oregon was established prior to that of the State of Washington, and it is not within the power of the national government to change that boundary without the consent of the State of Oregon."*

If it is not within the power of the "national government" to change the boundary of a State,



as the court in this case says, it seems an anomaly that the war department, which is but an insignificant part of the government, could change the boundary, at the *locus in quo*, by dredging an artificial channel.

The case of *Nebraska vs. Iowa, supra*, arose over a dispute as to the boundary line between the two States.

The States are separated by the Missouri river and the bed of this stream is subject to violent and sudden changes. By reason of this fact, numerous disputes had arisen between the two States on questions of *jurisdiction*, and between individuals on questions of *ownership* in private property.

The court held that the rule that must determine these questions, both as to the boundary line between the States, and as to ownership of property between individuals, was that, where changes in the channel were brought about by gradual and imperceptible changes, the boundary line remained in the middle of the channel as changed, but that where the changes were caused by sudden and *known* causes, the boundary line remained where it was formerly.

On this point the court says:



“It is settled law, that where grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner’s boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possession may vary.”

The court then adds:

“It is equally well settled, that where a stream, *from any cause*, suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein.”

In the case of *Missouri vs. Kentucky, supra*, the question arose as to the ownership, control and jurisdiction over Wolf Island, located in the Mississippi river.

Missouri was admitted into the Union in 1820, and Kentucky many years prior thereto, and both states claimed ownership and jurisdiction over this island.

In the course of the opinion, the court says:

“It follows, therefore, that if Wolf Island, in 1763 or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky



rightfully attached thereto. *If the river has subsequently turned its course*, and now runs east of this island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not, in consequence of this action of the water, change its owner."

As the boundary line between States, then, cannot be shifted by any sudden change in the channel of the stream dividing them, or by any artificial cause, as the authorities quoted above hold, then the said Tallas Island is still in the State of Wisconsin, and the main, *natural* channel of the body of water in question remains the boundary line between the two States.

If the middle of the main channel of the body of water, separating the lands of the plaintiff and defendant, is the boundary line between the two States, then the Circuit Court in this case was without jurisdiction.

State vs. Bowen, 149 Wis., 203.

Iowa vs. Illinois, 147 U. S. 1.

In the Matter of the Devoe Mfg. Co.  
108 U. S. 401.

In the case of *State vs. Bowen, supra*, the defendants were arrested and tried in La Crosse



county, Wisconsin, for an alleged violation of the game laws of the State in setting nets in the Mississippi River. The defendants were tried by the Circuit Court, without a jury, and the court made, among others, the following findings of fact:

That the defendants set a net in what is known as the east channel of the river, but *west* of the thread of said channel.

That said east channel lies between the Wisconsin shore and what is known as Minnesota Island.

That prior to 1876 said east channel was the main channel of the Mississippi River.

That in 1877 a railroad bridge was built over said east channel, from the Wisconsin shore to Minnesota Island, and thence to the Minnesota mainland, and the railroad company constructed a dam across said east channel.

That since the construction of said dam the main navigable channel has been to the west of said Minnesota Island and, since said date, the east channel has not been navigable for steamboats.

The defendants objected to the jurisdiction of the Circuit court on the ground that the nets were set in Minnesota and not Wisconsin territory. The lower court found the defendants



guilty but certified the question of jurisdiction to the Supreme Court of the State.

The Supreme Court held that the trial court was without jurisdiction. It held that the question of jurisdiction depended upon the question as to the true location of the boundary line, and examined into the question as to the proper location of the boundary line, but only for the purpose of determining the question of jurisdiction.

The case of *Iowa vs. Illinois, supra*, arose over a dispute between the States as to the jurisdiction of the States, respectively, to tax a railroad bridge over the Mississippi river at Keokuk, Iowa.

The enabling act admitting the State of Illinois provided, in part, as to the boundary of that State as follows:

“Thence west to the *middle* of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river.”

The Supreme Court of Iowa had held that that State had jurisdiction to tax such bridges to the middle of the body of water, measured from shore to shore. The Supreme Court of Illinois,



on the other hand, had decided that that State had jurisdiction to tax such bridges to the middle of the main channel. This had resulted in double taxation, and to settle this question of jurisdiction a direct action between the States was brought in the Supreme Court.

The latter court held that the State of Iowa had no jurisdiction over such bridges beyond the middle of the main channel. The court, in speaking of the decisions of the Supreme Courts of Iowa and Illinois, on page 13, says :

“The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream; but we are of the opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We, therefore, hold in accordance with this view, that the true line in navigable rivers between the States of the Union *which separates the jurisdiction of one from the other* is the middle of the main channel of the river. Thus the *jurisdiction* of each State extends to the thread of the stream, that is, to the mid-channel, and if there be several channels, to the middle of the principal one, or, rather, the one usually followed.”



The case of *In The Matter of The Devoe Mfg. Co., supra*, involved the question of jurisdiction between the States of New York and New Jersey.

A libel in admiralty, *in personam*, for damages growing out of a collision, was filed in the District Court of the United States for the District of New Jersey, and, under process, the Marshal of the District seized a tug lying in the waters of New York Bay, on the Westerly, or New Jersey side, of said waters, but at a point at least 300 feet below high water mark.

The respondent, insisting that the waters, at the point where the tug was lying when seized, were within the jurisdiction of the Eastern District of New York, and not within the jurisdiction of the District of New Jersey, applied to the court to set aside the process, and, upon the court's refusal, petitioned the Supreme Court to issue a writ of prohibition. The Supreme Court held that the boundary line between the two States was the middle of the main channel of the body of water, and as the tug was lying on the westerly side of the main channel, at the time it was seized, it held that the District Court of the United States for the District of New Jersey had exclusive jurisdiction. In the course of the opinion, the court says:

“Being thus within the State of New Jersey, was the tug within the District of New



Jersey and within the territorial jurisdiction of the District Court of the United States for the District of New Jersey? We are all of the opinion that, when the Act of Congress of 1789 declared that the New Jersey District should consist of the State of New Jersey, it intended that any territory, land or water, which should at any time, with the express assent of Congress, form part of that State, should form part of the District of New Jersey. By sections 530 and 531 of the Revised Statutes, the State of New Jersey constitutes a judicial district. The intention is that the boundary of the district shall be coterminous with the boundary of the State. The same thing is true as to the Southern District of New York, and as to the district across the waters at the *locus in quo*, which is the Eastern District of New York."

A little further on, the court says:

"It is consonant with the convenience and habits of the people, that when any place is within the limits and jurisdiction of a State, *it should not be joined to the whole or part of another State, as to the jurisdiction of the courts of the Federal Government.*"

We contend, therefore, that, under the authorities cited above, the Circuit Court was without jurisdiction in the case at bar.



We further contend:

1. That the absolute title to the Tallas Island, *under the laws of the State of Wisconsin*, vested in the defendant, long prior to the dredging of the artificial channel.

2. That, if the title did so vest in him, he could not be deprived thereof, even if it be conceded that the dredging of the new channel shifted the boundary line of the State.

The next question for consideration, therefore, is what title vested in the defendant to said island, under the laws of the State of Wisconsin?

### PART III.

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**Under the Law of the State of Wisconsin, the Shore Owner Takes Title in Fee to all islands Lying Between the Shore Line and the Main Channel of the Stream.**

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In a later chapter, we shall for the convenience of the court, give a brief review of practically all of the Wisconsin cases, on the question of riparian rights. But, under the present heading, we shall



confine ourselves to a consideration of those cases in which the title to islands has been involved.

Preliminary to a discussion of the main topic under this title, we desire briefly to call attention to the fact that the question as to the nature and extent of the title of a riparian owner, in the bed of the stream in front of his lands, is purely a question of *local* law, and where the United States makes a grant of lands, bordering on navigable streams, the nature and extent of the title of the shore owner, in the bed of the stream, is governed *solely* by the law of the State where the lands are located.

Barney vs. Keokuk, 94 U. S. 324.

Hardin vs. Jordan, 140 U. S. 341.

Hall vs. Hobart, 174 Fed. Rep. 439.

If, therefore, the title to the Tallas Island had, under the law of the State of Wisconsin, vested in the defendant, long prior to the dredging of the artificial channel, he could not be deprived of his property by such action upon the part of the war department.

Under the law of that State, a grant from the government, without reservation, of lands on the bank of a navigable river, vests in the purchaser of the upland the title to any unsurveyed islands,



lying between the main land and the channel of the stream.

Chandos vs. Mack, 77 Wis. 573.

Franzini vs. Layland, 120 Wis. 72.

Sliter vs. Carpenter, 123 Wis. 578.

Farris vs. Bentley, 141 Wis. 671.

In the case of *Chandos vs. Mack*, *supra*, the court says:

“In this state the settled rule is that a grant by an individual of land, which is bounded on a navigable stream, vests in the grantee the title in the bed of the river to the thread of the stream, subject to the public right of navigation.”

The court then says that the precise question, as to whether the title to an island in the stream would so pass, has never been directly decided by the court, but that there is no principle of law or reason for holding that it would not so pass.

In the case of *Franzini vs. Layland*, *supra*, the court on page 83, says:

“Little more need be said to fully decide this case. We deem the law too well settled here to warrant discussing the subject, that a riparian proprietor on a river, nothing appearing clearly to the contrary, *owns, as incident*



*to the shore*, all islands opposite the same so far as his riparian rights extend.”

In the case of *Sliter vs. Carpenter*, *supra*, on page 580, the court says :

“This ownership is predicated upon the ground that riparian proprietors in this State are, by concession of the State, the *owners* of the river bed, adjoining their land to the thread of the stream, and that this ownership extends to any island or dry land which may be formed thereon. Upon the trial the court dismissed the complaint, holding that the plaintiff and his assignors had shown no title to the island. Since there is no dispute but that the plaintiff and his assignors were the owners of the river bank included within lots 1, 2 and 3 at the time of the alleged trespass, under the established principle of the foregoing cases there can be no question as to their ownership of that part of the island situated on the river bed between this bank and the thread of the stream.”

In the case of *Farris vs. Bentley*, *supra*, on page 674, the court says :

“It necessarily follows that the survey of the island in 1905, and the patenting of the same to the defendant can have no effect on the plaintiff’s rights if his remote grantor acquired *title* by the patent of lot 5 on the north bank of the river.”



In the foregoing cases the court held that the title to the islands in question was an absolute *title in fee*; that the title passed to the shore owner in the same way as his title to the upland, and *by virtue* of his title to the upland, and in one of these cases the court held that the title of the shore owner to the islands in dispute was *superior* to the title obtained by another, under a subsequent survey and patenting by the government itself.

A review of the facts in these cases will confirm the statement made above.

The case of *Chandos vs. Mack, supra*, was an action in *ejectment*.

On page 574, the court says:

“The action is ejectment, brought by plaintiff’s intestate, who claimed to be the owner, as *riparian proprietor*, of an island in the Wisconsin river, a navigable stream.”

The answer admitted that the defendants were in possession, and alleged that the island was a part of the public domain. This was clearly, therefore an action to determine title to land.

The court decided in favor of the plaintiff, and on page 579 says:

“The quantity of land included in the island was never ascertained or attempted to



be sold, and we think it must be deemed to have been *included* in lots 3 and 4, and to belong to the riparian owner of those lots."

The action of *Franzini vs. Layland*, *supra*, was an action for damages for cutting timber on an unsurveyed island in the Mississippi river, adjacent to plaintiff's shore lands.

The first paragraph in the statement of facts reads as follows:

"Action for damages to real estate caused by cutting and removing therefrom small timber. It was commenced in Justice Court, and on the plea that the title to real estate would come in question was duly removed to the Circuit Court. Plaintiff's title to the land was put in issue, *and was the only matter of consequence controverted on the trial.*"

The Circuit Court directed a verdict in favor of plaintiff, and on appeal the judgment was affirmed.

The case of *Sliter vs. Carpenter*, *supra*, was an action for damages for cutting wood from an unsurveyed island in Wisconsin river, adjacent to plaintiff's shore land.

The trial court dismissed the action at the close of plaintiff's testimony. On appeal, the Su-



preme Court reversed the judgment, and remanded the case with directions to award judgment in favor of the plaintiff.

In the case of *Farris vs. Bentley, supra*, it appears, from the first paragraph in the statement of facts, that the action was one in *ejectment* to recover possession of an island in the Wisconsin river; that the plaintiff claimed title by virtue of a patent, for a lot on the bank of the river, issued in 1854, and the defendant claimed title by virtue of a survey of the island, made in 1905, and a patent from the United States issued thereon in 1908.

The trial court rendered judgment for the plaintiff, and, on appeal, the judgment was affirmed.

It appears, therefore, that in all of these Wisconsin cases *title* to the islands in question was directly involved; two of the actions being in *ejectment*, and two of them being actions for damages, on account of the cutting of timber, which directly involved the question of title.

It appears also that the judgments rendered were for an absolute and unconditional title, the same as would have been rendered in similar actions, where shore lands, instead of islands, were involved.

This same doctrine, in regard to the nature and extent of the title of the shore owner to islands ly-



ing between the shore line and the thread of the stream, is not maintained by Wisconsin alone, but by many other jurisdictions.

Grand Rapids & Indiana Ry. Co. vs.  
Butler, 159 U. S. 87.

Whitaker vs. McBride, 197 U. S. 510.

United States vs. Chadler-Dunbar  
Water Power Co., 209 U. S. 447.

Schurmeier vs. St. P. & P. R. R. Co.,  
10 Minn. 82, (Gil. 59).

Webber vs. Axtell, 94 Minn. 375.

Hall, et al, vs. Hobart, 186 Fed. Rep.  
426.

The case of *Grand Rapids & Indiana Ry. Co. vs. Butler, supra*, was an action to *quiet title* to an island. The action was brought by the owner of the upland against the defendant who claimed ownership of the island under a survey and patent issued thereon *subsequent* to the time the patent was issued for the upland.

The Supreme Court of Michigan decided in favor of the shore owner, and the Supreme Court of the United States sustained the decision. On page 90, the latter court says:

“The court held that the well recognized rule in Michigan was that a grantee of land bounded in the deed of conveyance by a stream takes *title* to the land under the water to the



thread of the stream in the absence of an express reservation; that reservation cannot be implied; when the government has surveyed its lands along the bank of a river and has sold and conveyed said lands by government subdivisions, *its patent conveys the title to all islands lying between the meander line and the middle thread of the river.*"

The case of *Whitaker vs. McBride, supra*, was an action to *try title* to an island between the patentee of the upland and one who had settled on the land after the patent had issued.

The Supreme Court of Nebraska held the title to the island was in the shore owner, and the Supreme Court of the United States sustained the decision. On page 512 of the opinion, the court says:

"If there were no island in this case it would not, under these authorities, be questioned that the title of the riparian owners extended to the centre of the channel. How far does the fact that there is this unsurveyed island in the river abridge the rule?"

The court then goes into a lengthy discussion of the question, and a review of the authorities, and arrives at the conclusion that the owner of the upland is the owner of the island.



In the case of *United States vs. Chandler-Dunbar Water Power Co.*, *supra*, the United States brought a bill in equity to remove a cloud from its alleged title to two islands in the Sault Ste. Marie river, or strait, the said waters forming the boundary line between the United States and Canada.

The islands had never been surveyed and the defendant claimed title to the islands by virtue of its patent to the upland. The United States claimed the patent was void because the land had been reserved for public purposes, and that, even if the patent was valid *it did not pass the title to the islands*.

The Supreme Court of Michigan dismissed the bill and upheld the title of the adjoining shore owner to the islands, and the decree was affirmed by the Supreme Court of the United States.

On page 452 of the opinion, the court says:

“The question, then, is narrowed to whether the bed of the strait is held to pass by the laws of Michigan. We are content to assume that the waters are *public* waters. But whatever may be the law as to lands under the great lakes, we believe that the law still is as it was declared to be in *Grand Rapids & Ind. R. Co. vs. Butler*, 159 U. S. 87, that a grant of land bounded by a stream, whether navigable in fact or not, carries with



it the bed of the stream to the center of the thread thereof."

It will be observed, in all of the cases which we have cited on this point, that the courts have squarely held that the title to the islands in question passed by virtue of the *patents to the upland*. That is, that the title to the islands was of the same kind and character as the title to the shore lands, and passed by the same instrument.

It is also to be observed that, in many of these cases, the government surveyed and patented these islands to another than the owner of the upland, but in every instance the courts held that these patents were void and that the title to the islands had already passed to the owner of the shore lands.

The very fact that the government surveyed these islands and attempted to issue patents for them, the same as it would for uplands, is a direct recognition of the fact, *by the government*, that these islands were capable of private ownership, in the same sense that uplands were.

In fact, in the case of *U. S. vs. Chandler etc.*, *supra*, the government contended that the bed of the river and islands therein were not subject to private ownership. This is shown by a reference to



the points relied on by the government, and printed in 52 Law Ed. 882, as follows:

“The preeminent interest of the public in these waters, for the purpose of navigation and other purposes, is superior to that of individuals owning the lands bordering thereon; and *private ownership* of the bed of the waters is absolutely inconsistent with the public interest.”

Here, then, in a direct action to determine *title* to islands, in a navigable river, the government itself, as plaintiff, took the position that such islands were not capable of *private ownership*. But the court answered that the question as to whether these islands were subject to private ownership depended entirely upon the law of the State of Michigan, and that the Supreme Court of that State had held they were subject to private ownership.

Even in Minnesota, where it is held that the title of the shore owner extends only to *low water mark*, whenever the question has arisen as to the title to an island in a river, the courts have invariably awarded the *title* to the adjoining shore owner.

The case of *Schurmeier vs. St. Paul etc., supra*, was not a direct action to try title, but it involved the question of title.



The plaintiff brought the action to enjoin the defendant from constructing its railroad on the levee of the Mississippi river so as to intervene between his shore lands and an island in the river, the title to which island he claimed passed to him *by virtue of the patent for the shore lands*.

The defendant claimed title to the island *under a subsequent survey* of the island made by the government in 1856.

Thus it will be seen that the court was called upon to pass directly upon the question of title between plaintiff and defendant. That the court did directly pass on the question of title, and did hold that *the title in fee to the island* was in the plaintiff, is made manifest by the following quotations from the opinion.

On page 76, the court says:

“In this case no intention is in any way indicated to limit the *grant* to the waters’ edge, and if the common law rule prevails here, Roberts (the patentee) *by his purchase*, took to the centre of the river, including the land subsequently surveyed by the government—called Island No. 11— and which is now claimed by the defendants.”

Again, on page 77, the court says:

“The fact that these rivers are, and must



remain, public highways, *is not at all inconsistent with the view, that riparian owners have the fee of the bed of the stream.*"

In the case of *Webber vs. Axtell, supra*, the action was in *ejectment*, which directly involved the question of *title in fee* to an island. The plaintiff claimed title by virtue of his patent to the upland, the defendant claimed title by reason of a subsequent survey and patent issued thereon. The court held the title to the island was in the owner of the upland.

The case of *Hall et al, vs. Hobart, supra*, was not decided by a Minnesota state court, as it arose in the federal courts of that State, but the court made an elaborate review of the Minnesota decisions and decided the case in accordance with what it conceived to be the views of the Supreme Court of that State.

In the first paragraph of the statement of facts, the court says:

This was an action of *ejectment*, instituted by the defendant in error, Corinna L. Hobart, to recover possession of a lot of ground fronting on the Mississippi river, commonly known as "Boom Landing," and the accretion and rights appertaining thereto, including part of an island which arose from the bed of the



river opposite to it, and known as Halls Island. Her remote grantor acquired the lot by patent from the United States, dated March 24, 1849, in which it was bounded on the Southwest by the Mississippi river. The defendant, the City of Minneapolis, claimed the island through mean conveyances from the State of Minnesota, which asserted title to it by *reason of its ownership of the bed of the river.*"

Thus we see that the question was squarely raised in this case as to whether the adjoining shore owner, by virtue of the patent to the upland alone, had a better title to this island in the Mississippi river than the State of Minnesota.

The court decided the case in favor of the adjoining shore owner.

We contend that no matter what construction may be placed upon these Minnesota cases that the defendant is not bound by them, for the reason that the Tallas Island is in the State of Wisconsin, but we have cited them for the purpose of showing that, even in a State where it is held the title of the shore owner extends only to low water mark, the title to islands, lying opposite his lands, vests in him, even as against the State.

A great deal of confusion and misunderstanding has arisen by reason of the difference in the nomenclature and terminology, used by the courts



of the various States, as to the nature and extent of the title of the owner of the upland, in the bed of the stream in front of his lands.

When reduced to its last analysis, they all reach the same result, *so far as the practical effect is concerned.*

For instance, the Minnesota courts *declare* that the owner of the upland only holds the title in fee to *low water mark*. But whenever the question arises as to who has the right to fill in and wharf out, and use and occupy the submerged lands and islands in front of the shore lands of the riparian owner, the Minnesota courts have uniformly declared that the shore owner had this right as against the world.

The Supreme Court of Minnesota has held that the riparian right is a property right, that the owner thereof cannot be deprived of it without just compensation, and that this riparian right can be disassociated and sold separate and apart from the right to the upland.

Brisbine vs. St. P. R. Co., 23 Minn.  
114.

Hanford vs. St. P. & D. R. Co., 43  
Minn. 104.

On the other hand, such states as Wisconsin and Michigan hold that the shore owner has the



*title* to the submerged lands opposite the shore lands, but that he holds this title, subject to the right of public navigation.

The purpose of all of these states is the same, to preserve the right to control navigation; but the position of such states as Wisconsin and Michigan is more logical than that of Minnesota, for the former hold that the title to the submerged lands is in the adjoining shore owner, but subject to an easement in favor of the public, while the latter holds that the adjoining shore owner has *no title* in the submerged lands, and winds up by giving him the right to fill in, wharf out, use and occupy, as against the world, and sell and dispose of the submerged lands opposite his shore lands, out to the point of navigability.

Such states as Minnesota and Iowa, which declare that the riparian owner only has title to high or low water mark, seem to have deemed it necessary to limit, in terms, the title of the shore owner, in order to preserve the right of controlling navigation.

None of these States pretend that they have any *proprietary* interest in the soil under navigable waters, and the only reason they assert it, in different forms, is, not for the purpose of asserting any real, or substantial, title to the bed of the stream itself, *but for the purpose of controlling the*



*use of the waters that flow over the bed in the interest of public navigation.*

The sole source and reason for the assertion of the doctrine that the State has the power to control the *waters*, flowing over the bed of a navigable stream, is that *water* is capable of being used for purposes of navigation, and not for the purpose of asserting any actual title to the bed of the stream.

But the underlying reason for the exercise of this right of control has no application to islands.

There is this distinction to be noted between the *bed* of the stream, to which the owner of the upland has title, and an *island* that forms on the bed; and that is, the difference in *use* that it is permissible to make of the one and not of the other.

Even in those States where the shore owner is recognized as the absolute owner of the *bed* of a stream, he has no ownership in the *water*, flowing over the bed. It is this flowing water that makes a channel for commerce and a track for trade. And it is for this reason, and for no other, that title to the bed of the stream, where such title is permitted, is made subject to the public right of navigation.

But an island, in a river, can no more be utilized *for the purposes of navigation*, than the upland can. Both consist of soil and other solid substances, and neither is capable of being used for purposes of navigation. The reason for the rule,



therefore, that the title to the bed of a stream is subject to the right of public navigation, disappears in the case of an island formed on the bed of a stream; and for this reason absolute *use* as well as absolute title can be, and is, given to the owners of islands on the beds of navigable streams, while absolute use of that part of the bed covered with water is withheld.

If islands in rivers could not be occupied and used, they would become so much waste land, and it is but natural, therefore, that, in those jurisdictions where it is held that the owner of the upland is the owner of the bed of a stream, subject to the public right of navigation, that the courts should also hold that he is not only the owner of an island formed on the bed, but that he also has the right to occupy and use such islands to the exclusion of everyone else.

This distinction was evidently in the mind of the court in *Hall vs. Hobart*, *supra*, when it made the following statement:

“It is true the State holds the naked title, but holds it without any proprietary interest, and only in its governmental capacity, as a dry trust for the use of the public in a very limited sphere. As this trust cannot continue beyond the period when the subject of it ceases



to be available for the purposes of the trust (Doc. Lessee of Poor vs. Considine, 6 Wall 458, 471, 18 L. Ed. 869), it is not perceived how it can be called into exercise so far as Hall's Island itself is concerned. *This probably can no longer be utilized for purposes of navigation.*"

It will be remembered that this was an action in ejectment brought by the plaintiff, as the owner of the shore lands, to recover the possession of an island, in the Mississippi river, from the defendant claiming title under a patent from the State of Minnesota; that in that State the courts hold that the title of the shore owner extends only to low water mark, and that *the title to the bed of the stream is in the State.*

But notwithstanding the fact that the courts of Minnesota hold that the *title to the bed of a stream* is in the State, and notwithstanding the fact that the court in this case held that the law of the State of Minnesota was controlling, the court in this case gave the title to the *island* to the patentee of the upland as against one holding under a patent from the State itself.

The only construction that can be placed upon the language of the court is, that the State held the title to the bed, as trustee, to protect the public interests and to control the *waters* flowing over the



bed for the purpose of promoting navigation; that when the purposes of the trust ceased, the trust itself ceased, and that as an island could not be utilized for purposes of navigation, the bare title, or trusteeship, of the State, over that part of the bed on which the island had formed, could no longer be exercised. Hence, the language of the court, "*This (the island) probably can no longer be utilized for navigation purposes.*"

Having shown by the authorities cited in this chapter, that the title to the Tallas Island had vested in the defendant, by virtue of his patent to the upland, we contend that he could not lawfully be deprived of the title to this island, even if it be conceded that the dredging of the new channel operated to shift the boundary line between the two States.



#### PART IV.

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**Conceding that the Dredging of the New Channel Shifted the Boundary Line Between the States It Could Not Operate to Transfer the Title to the Tallas Island From the Defendant to the Plaintiff.**

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In a preceding chapter we have shown that, while Judge Morris held the *original* boundary line between the States was the middle of the natural channel, north of the Tallas Island, he also held that the dredging of the new channel shifted this boundary line to the south of said island.

He further held that, while the "right or title" of Whiteside *originally* extended to the middle of the natural channel, on the north side of the Tallas Island, and that Norton had no right or title thereto, that the dredging of the new channel to the south of said island operated to transfer all the right or title which Whiteside had theretofore had in said island to the plaintiff, Norton.

At the bottom of page 123 of the Record, Judge Morris says:

"I think there can be no doubt that *prior* to the construction of this improved channel



by the government, Whiteside had this right on the south side and up to the natural, navigable channel, *which would include the locus in quo*, and that Norton's right extended *only* to this natural, navigable channel on the *north* side.

"But I think that under the principles of the decisions and the reasoning thereof, if this natural, navigable channel had been changed or shifted by natural causes so as to (—) through the *locus in quo* to the north side of said channel, that Whiteside's right would have ceased, or been defeated, and that this right would have belonged to Norton by virtue of his riparian proprietorship on the north, or Minnesota side. In other words, that by the shifting of the channel the right or title, call it what you may, would have shifted; and this whether the *locus in quo* still remained land under water, or had become in whole or in part an island."

Judge Morris holds that the sudden or artificial shifting of a channel from one side of an island to the other would transfer the "right or title" to the island from one party to another, according to the side of the channel he happened to be located on.

But we contend that if the title to an island had vested in a particular person, that not only would his title not be divested by a sudden or



artificial change in the channel from one side of the island to the other, but that the title to the island would not be affected, even though the change in the channel had been brought about by gradual, imperceptible and *natural* causes.

In the preceding chapter, in which we discussed the question as to the nature and extent of the title of the shore owner to islands lying opposite his lands, the courts, not only of Wisconsin, but of many other jurisdictions, held that the title was an absolute title in fee; that the title to the islands passed to the shore owner "*by virtue of his patent to the upland.*" In every one of the island cases which we cited, the action was either one in ejectment, to try title, or remove a cloud on title, and in none of these cases did the courts intimate that the title of the shore owner to the island was a qualified, or conditional, one, or that the title was of any different quality or character than the title to the upland. In fact, in nearly every one of these cases it was said that the title to the islands passed by virtue of the patents to the upland.

It is also to be remembered, that, in several of these cases, the government had, subsequently to the patenting of the uplands, *surveyed and actually issued patents to islands, lying opposite the shore lands, to others than the owner*



*of the shore lands*, and that, in every case of this kind the courts, including this court, decided that the subsequent surveys and patents were void, for the reason that the title to such islands had already vested in the owner of the uplands, by virtue of his patent thereto.

Now, if the government itself could not dispossess the owner of the title to an island, lying opposite his shore lands, by the subsequent survey and patenting of such island, by what process of reasoning or argument can it be held that some board of government engineers could transfer the title to an island from one person to another, by digging an artificial channel in a particular place?

When title to a specific piece of property has once vested in a person, it is a fundamental principle of the constitution and laws of this country that it cannot be taken away, except by process of law and the payment of just compensation.

The government has, in many instances, at the time of the original survey of the upland, surveyed, sold and patented islands, lying in the stream opposite the upland. And the instances are not rare where, in such cases, the channel of the stream has, in the course of time, shifted from one side of the island to the other.

Would anyone contend that the shifting of



the channel from one side to the other had deprived the owner of his patented title to such island? If not, it certainly could not be held that such effect had been produced in the case of an unsurveyed island, for in the island cases which we cited the courts held that the owner of the shore land obtained his title to islands in the stream by virtue of his patent to the upland, and they also held that this title was superior to the title obtained under a subsequent survey and patent issued thereon by the government itself.

In two of the Wisconsin island cases cited above, the Supreme Court of that State held that the shore owner, opposite an unsurveyed island, had the right to recover damages from a trespasser for cutting timber on said islands.

No such holding could have been made unless the court had found that the owner of the upland was the owner of the island, that he had the right to enter thereon and use and occupy it in such manner as he saw fit.

Under the holding of all of these Wisconsin cases, Whiteside, or his predecessors, would, at any time after they obtained their title to the upland, which was in June, 1868, (See Record, top of page 6) have had the right to enter upon this island and have placed valuable improvements thereon. Suppose that he had done so, and



had erected buildings and structures, costing thousands of dollars, under the theory adopted by Judge Morris, he would have had a good right or title to the island and these costly improvements placed thereon, up to 1899-1902, the time the artificial channel was dredged, but upon the completion of such channel all such property rights would have passed to Norton, the plaintiff.

In fact, the Circuit Court found in its decree, paragraphs 22 and 23, Record, page 133, that at the commencement of the dredging of the said channel, there was a small house on said island, that said house afterwards burned down and another house was built thereon.

It is true that this house was probably an expensive one, but the principle involved in the transfer of title is no different than if it had cost thousands of dollars.

The decisions of the Supreme Court of the United States have uniformly upheld the doctrine that the change in the channel of a stream, from any sudden or known cause, does not change the boundary line between States, *or between private property rights.*

In *Nebraska vs. Iowa*, 143 U. S. on page 360, the court says:



"It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owners' boundary line still remains the stream, although during the years, by this accretion, the actual area of his possession may vary."

In the next paragraph the court says:

"It is equally well settled, that where a stream which is a boundary, *from any cause* suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no waters may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, Sec. 159, it is said: 'But if the change is violent and visible, *and arises from a known cause*, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the estates.' These propositions, *which are universally recognized as correct where the boundaries of private property touch on streams*, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water."

In this case, then, the court distinctly recog-



nizes the doctrine that a sudden, or perceptible, change in the channel does not affect *private property interests*.

In the case of *Missouri vs. Nebraska*, 196 U. S. 23, the court reiterated the doctrine laid down in *Nebraska vs. Iowa*, *supra*, that the principle of law, in reference to the change of a channel, by sudden or known causes, "apply alike "whether the rivers be boundaries between *private property*, or between states and nations."

In the case of *Missouri vs. Kentucky*, 78 U. S. 11, the controversy arose over the jurisdiction and ownership of Wolf Island, in the Mississippi River.

Missouri was admitted to the Union in 1820, and Kentucky many years prior thereto, and both claimed ownership and control over said island.

In the course of the opinion, the court says:

"It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. *If the river has subsequently turned its course*, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and



the island does not, in consequence of this action of the water, *change its owner.*"

In the case of *City of St. Louis vs. Rutz*, 138 U. S. 226, the court says:

"As the law of Illinois confers upon the owner of land in that State which is bounded by, or fronts on, the Mississippi River, the title in fee to the bed of the river to the middle thereof, or so far as the boundary of the State extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of the middle of its width. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the State of Missouri, to extend his ownership by mere accretion, to land situated in the State of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that State.

"We must not be understood as implying that if an island in the Mississippi River remains stable in position, *while the main channel of the river changes from one side of the island to the other*, the title to the island would change because it might be at one time on one side and at another time on the other side of the boundary between two States."

We contend, therefore, that, if the dredging



of this artificial channel did change the boundary between the States, which we deny, that it did not effect a change in the ownership of the Tallas Island, for the reason that the title to said island had vested in the defendant, long prior to the dredging of said channel.

In closing the discussion on this question of the title to the Tallas Island, we desire briefly to call attention to the character of the island itself.

In the bill of complaint, counsel always refer to this island as a low, marshy island, and they introduced some testimony to show that, in the early stages of its formation it was at times covered with water. In other words, they sought to treat this island as a bog, or marsh, and not as a stable body of land.

But the defendant contends, first, that the evidence introduced by plaintiff himself shows that this island was a stable body of land, long prior to the time the said artificial channel was dredged, and, second, that, under the decisions in other cases, it is, as a matter of law, to be considered and treated as an island.

In the first place, the maps and plats introduced by plaintiff show that this island began to form many years prior to the commencement of the dredging of the artificial channel, in 1899.



The witness, Richardson, testifying for the plaintiff, in 1910, said that he "had a distinct recollection of that island" for the past twenty-one years. (Record, p. 106.)

The witness for the plaintiff, Taylor, who had charge of the dredging of the artificial channel, testified that there was a house on the island when the channel was dredged; that the portion of the island dredged out was marsh, but the north part was not marsh, and that there was a growth of willows and alders on the island. (Record, fol. 89.)

So much for the evidence.

In the case of *Grand Rapids & Ind. Co. vs. Butler*, 159 U. S., one of the island cases cited above, the court, on page 89, quotes with approval, the following language from the opinion of the Supreme Court of Michigan:

"A large mass of testimony was taken as to the character of this so-called island at the time of the original surveys and for some years subsequent, the complainant's testimony tending to show that it was at first a low sand bar covered a good part of the year with water, and the defendant's testimony tending to show that it was then a well defined island. It is immaterial to determine what the facts are as to the condition of this



land in those early days, for in our judgment it is of no consequence whether it was what might be termed an island or a sand bar or a piece of low wet ground. *The law is the same in either case.*"

The so-called Tallas Island, therefore, must be deemed and treated as an island.

We shall next take up for discussion the question of the doctrine of "Access."

## PART V.

### THE RIGHT OF ACCESS.

Counsel for the plaintiff lay great stress upon the right of access to the *artificial* channel, and the right to go out to that channel *in a straight line* from plaintiff's shore lands.

Although the plaintiff was, admittedly, confined to the use of the old, *natural* channel, prior to the dredging of the new channel; although this old, natural channel lies immediately in front of plaintiff's lands, and is, as we shall show, in substantially the same condition now that it always has been; although the plaintiff has access, through the old, natural channel, to the artificial



channel, at a point a few hundred feet easterly of plaintiff's lands, nevertheless, the plaintiff contends that this right of access gives him the right to extend over and fill in the old, natural channel, immediately in front of his shore lands, and further to appropriate to his own use the Tallas Island, the title to which had already vested in the defendant, in order to enable the plaintiff to reach the new, artificial channel.

In other words, the plaintiff maintains that this right of access not only gives him the right to reach the *natural* channel, but also to reach any artificial channel that might be dug, even though the exercise of this latter right would necessitate filling up the old, natural channel and the appropriation of property belonging to another.

The defendant, on the other hand, contends:

*First*, that the doctrine of access is the right to go to the *natural* channel of the stream.

*Second*, that the right to go to an artificial channel cannot be exercised where it necessitates the crossing of a boundary line of a State:

*Third*, that it cannot be exercised where it necessitates the crossing and appropriation of property, the title to which has already vested in another:



*Fourth*, that, as a matter of fact, the plaintiff still has access to the natural channel of the stream, in substantially the same manner that he had at the time he received his patent for the shore lands, and that through this channel he has access to the said artificial channel.

*Fifth*, that if the plaintiff has not the same access to the natural channel that he originally had, or if the said channel has become less useful for the purposes of navigation than it formerly was, said conditions have been brought about by natural causes, or by persons, or agencies, other than defendant, and that plaintiff cannot recoup his loss, occasioned by such causes, by the appropriation of rights, or property, belonging to the defendant.

The right of access is a doctrine as old as the doctrine of riparian rights itself. It is a *natural* right, and the essence of the right is the right to go to the *natural channel* of the stream, as it existed at the time the riparian owner received his title to the shore lands.

This right existed long prior to the times, when nations, or states, entered upon the elaborate schemes of digging artificial channels.

There is nothing in the doctrine of the right of access that guarantees to every shore owner



the right to extend the side lines of his shore land, *in a straight line*, to any artificial channel that might thereafter be dug by human agencies. If there were, then these human agencies could shift and transfer *natural property rights* from one to another.

Artificial channels may, and frequently do, run in a different direction than the natural channels, and are run in such manner, that the approach to them, by the extension of the side lines of the lands of the various shore owners, would be at entirely different angles than would the approach to the natural channel.

The government undoubtedly has the right to lay out dock lines and to construct artificial channels within said lines, but there is nothing which inheres in this power, nor was it ever contemplated by the government, that the construction of artificial channels should, in any way, affect, or change, *natural* property rights.

In *Gould on Waters*, Sec. 138, the author says:

"The mere establishment of harbor or dock lines does not change rights of property." And the same doctrine is laid down in *I Farnham*, (3rd Ed.) p. 511.



Suppose the plaintiff, prior to the construction of said artificial channel, had brought an action to determine his riparian right, can there be any question but that he would have been limited to the right to go to the natural channel?

Or, suppose that the defendant had, prior to the construction of said artificial channel brought an action to quiet his title to the said Tallas Island, can there be any question, under the authorities on the island cases heretofore cited, but that the court would have held the title to the island was in him?

And, yet, under plaintiff's contention, the defendant has lost property rights to which he was theretofore entitled, and the plaintiff has gained rights to which theretofore he was not entitled, by the election of some engineer, or board of engineers, to dig an artificial channel at a particular place.

We contend that no officer of the government has the right, or power, either to add to, or diminish, the property rights of any riparian owner.

Second, we contend that a riparian owner cannot claim the right to extend out to an artificial channel, where the exercise of the alleged



right would necessitate the extension of his riparian rights, beyond the boundary line of the State in which the shore land is located.

The ownership of the riparian rights is an *incident* to the ownership of the shore land. Or, as it was expressed in the island cases which we have heretofore cited, the title to the fee of the bed, and to islands forming thereon, *passes by virtue of the patent to the upland*.

Now it cannot be possible that the patent to a piece of land in Minnesota, on a navigable stream, carried with it, as *an accident*, riparian ownership to lands located in Wisconsin waters.

As it was held in the case of *Iowa vs. Illinois*, *supra*, that the boundary between the two States must necessarily be the line of demarcation as to *jurisdiction*, so it must follow that the boundary between the States must be the line of division as to *ownership*.

In the case of *Franzini vs. Layland*, 120 Wis., an page 82, the court says:

“The rule above stated must necessarily be modified as regards riparian proprietors upon a stream forming a boundary between two states, where the dividing line of jurisdiction is the centre of the main channel of such stream, *since a state cannot clothe a per-*



*son with any interest in land beyond its boundary."*

In the case of *City of St. Louis vs. Rutz*, 138 U. S., on page 951, Law Ed., the court says:

"As the law of Illinois confers upon the owner of land in that State which is bounded by, or fronts on, the Mississippi River, the title in fee to the bed of the river to the middle thereof, or so far as the boundary of the State extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of the middle of its width. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, *and in the State of Missouri*, to extend his ownership, by mere accretion, to land situated in the State of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that State."

And yet, what this court says cannot be done, is exactly what the plaintiff seeks to do in this case, with reference to the Tallas Island, if we are correct in our position that the boundary line between the two States is the middle of the old, natural channel.

Third, we contend that the right of access



to an artificial channel cannot be exercised, where the one seeking the right, appropriates the property of another.

This proposition depends upon the question as to whether the defendant is the owner of the so-called Tallas Island.

We have already discussed that question at length and shall not elaborate on it further.

Fourth, we contend that the plaintiff still has access to the natural channel, and that this channel opens into the said artificial channel a few hundred feet east of plaintiff's property.

The above facts will appear from an examination of Plaintiff's Exhibits 6 and 9.

It is true that the plaintiff cannot reach the *artificial* channel, in this way, by going out in a straight line from his property to the artificial channel. But he can reach the *natural* channel by going out in a straight line. The inability to go out in a straight line always occurs on irregular shaped bodies of water like the one at the *locus in quo*.

In fact, a mere inspection of Plaintiff's Exhibits 6 and 9 will show that it would be absolutely impossible for all riparian owners on the shores of these waters to reach the navigable



channels by extending out in a straight line, owing to the irregularities of the shore line.

But the plaintiff contends that the natural channel, in front of his premises, has been partially filled up and that it is no longer fit for boats of the largest draft, and that he ought therefore to be allowed to wharf out to the artificial channel.

In reply to this we say that an examination of the Exhibits 6 and 9, introduced by plaintiff, show that the natural channel, in front of plaintiff's premises, is from 23 to 31 feet in depth, and the artificial channel, in front of his premises is from 19 to 21 feet in depth.

The plaintiff, however, says, that the natural channel has filled up to a certain extent since these plats were made, but to what extent there is absolutely no evidence in the case.

If there is any significance in the filling up of the natural channel, as affecting plaintiff's rights, the burden of proof was certainly on him to show to what extent the channel had been filled up.

The plaintiff himself introduced the plats showing the government soundings, as to the depth of these channels, and it would certainly require very definite evidence, on the part of the plaintiff, to show that this situation had changed.



There is not a particle of evidence in the Record to show that the plaintiff had any soundings of this channel made, prior to the trial.

Plaintiff's witness Richardson, did testify that, to some extent to him unknown, the channel had filled up. But his testimony, taken as a whole on this point, shows that he was merely testifying to a conclusion, for, on cross examination, he admitted that he had made no measurements as to the depth of the channel, but that his testimony that the channel had filled up was based entirely upon his opinion and on hearsay. (Record, fols. 118-119.)

On the other hand, plaintiff's witness, Taylor, who is the assistant government engineer who had charge of the dredging of the artificial channel, testified that the natural channel was practically the same depth as it was before the artificial channel was dredged out, and also testified that boats of the same draft could go into the old channel as could before the dredging. (Record, fol. 90)

The only place where it is shown that the natural channel has been filled up, is at a point westerly of plaintiff's premises. At this point, the artificial channel crosses the natural channel, and the dredging from the artificial channel filled up the natural channel at that place. But



the easterly end of the natural channel opens into the artificial channel and gives direct entrance into the harbors of Duluth and Superior, and from there into Lake Superior, both the harbors and the lake being east of plaintiff's premises.

We have thus shown by plaintiff's own testimony that plaintiff substantially enjoys all of the riparian rights that he had at the time he obtained his title to his shore lands.

But, for the purposes of argument, let it be assumed that the natural channel, in front of plaintiff's premises, has been filled up to a certain extent. In what way, or for what reason, would this fact operate to extend, or increase, plaintiff's *natural* riparian rights.

If the natural channel has been filled up to any extent, and if this has been brought about by *natural causes*, it certainly would not operate to extend, or increase, plaintiff's riparian rights.

Plaintiff does not claim that he has been deprived of all of his natural, riparian rights, but that they have been lessened and made less valuable. But to the partial extent the natural channel was filled up, it was done by the government, and this, as the Circuit Court of Appeals says, the government had the right to do.

Gibson vs. United States, 166 U. S.  
269.

Scranton vs. Wheeler, 179 U. S. 141.



If the channel, in front of plaintiff's premises, has been filled up to any extent, it certainly cannot be claimed that it was due to any act on the part of the defendant, and, if caused by some other agency, upon what principle of law, or reason, can he recoup himself for his loss, by the appropriation of the defendant's property?

If this channel has been filled up to any extent, so as to render it unfit for purposes of navigation, all the plaintiff has to do is to dredge it out and deepen it, the same as all other shore owners have to do.

The government, when it dredges out an artificial channel, does not go to the expense of providing a *navigable approach*, from the shore of the riparian owner to the channel dredged out. The government provides one main artery of commerce and the riparian owner must connect himself with that artery at his own expense.

The exhibits introduced by the plaintiff in this case show that many riparian owners are from 1,000 to 2,000 feet from the government channel, but everyone of these shore owners, if he desires to reach the government channel, must dredge out other channels to connect his property with the government channel.

Neither does the government, when it



dredges out an artificial channel, have in mind, contemplate, or concern itself, with the manner, or direction, in which the shore owner shall approach the artificial channel. That is a question of law, which involves property rights as between the various shore owners, and the question as to whether he has a right to dredge out to the artificial channel, *in a straight line*, is a matter that is exclusively within the jurisdiction of the courts.

We contend, therefore, that plaintiff's riparian right is a *natural* right, and that its nature and extent is to be determined by the relation his upland bore to the channel at the time he received his title, and could not be enlarged by the accidental circumstance that an artificial channel was dug in a particular place.

We contend further that even if his natural riparian rights have been lessened and rendered less valuable, that he cannot, for this reason, take and appropriate to himself property rights which had already *vested* in the defendant.

No one can deny that, prior to the construction of the artificial channel, the defendant would have had the right to take possession of the Tal-las Island and place valuable improvements thereon.

If he had done so, would any one contend



that, after the artificial channel was dug, the plaintiff would have had the right to take possession of the island and the improvements the defendant had made?

The fact is, that the plaintiff has substantially the same riparian rights now that he had prior to the construction of the artificial channel, and we contend that the construction of said channel did not enlarge his natural rights, or give him any right to take property that, prior to the construction of said channel, belonged to another.

We desire to call attention to the fact, that, so far as the title to this island is concerned, no question or controversy arises in this case as between the government and defendant.

The question here presented is purely one of private property rights between the plaintiff and the defendant. In other words, which one has the better right to the use and occupation of this island?

It may be possible that the government would have had the right to take the whole of this island for purposes of navigation, but it did not do so.

The government dredged the said artificial channel more than twelve years ago. It left the Tallas Island where it is, and has known all of



these years that it was there. It has never attempted to remove it as an obstruction to navigation. It has never made any claim of title or ownership to it, or the right to control or dispose of it, or to say who should use and occupy it.

This island is land, and certainly belongs to some one, or is no man's land.

The only question involved in this case, therefore, is whether the plaintiff or defendant has the better right to this island.

On this point, the Circuit Court of Appeals well said:

"In this case then the government had the right to make the channel improvement that it did make. It used such parts of the river bed as it needed to use, cutting away the sandbars and small islands that were regarded as obstructions to navigation, including parts of the island in controversy.

"In so doing it aimed to take, and did take, no property from complainant. Thus far the complainant had no rights in this island. The government might, perhaps, have taken this entire Tallas Island for the necessities of navigation, but it did not do so; consequently, title to that portion which was left, after cutting the new channel, remained in Whiteside as before. The effect of complainant's contention is that this act of sovereignty created in him, as against the defendant, a proprietary right which had no



previous existence. This position seems to be in hopeless conflict alike with reason and authority."

Upon the foregoing considerations, therefore, we contend that the decision of the Circuit Court of Appeals, should be sustained.

We have, for the convenience of the court, prepared a summary of the more important decisions of the Supreme Court of Wisconsin, on the question of riparian rights in that State, and present the same for the consideration of the court in the next chapter of this brief.

## PART VI.

### **Summary of the Decisions of the Supreme Court of Wisconsin, on the Question of Riparian Rights Under the Law of That State.**

The land involved in this case is situated in the St. Louis River on the south or Wisconsin side of the center of the main channel or thread of the stream and is therefore owned by appellant Whiteside under the Wisconsin rule. *The Wisconsin rule is the one that governs in this case and it cannot be successfully contended that that*



rule is not as above stated. It follows that appellant Whiteside cannot be deprived of his title to this land arbitrarily and without compensation. Upon principle the Wisconsin rule is unanswerable and the decisions of the Wisconsin Supreme Court and their reasoning is unassailable. All courts agree that the shore owner upon a non-navigable stream holds title to the center of the stream. Why should there be any difference between the rights of a shore owner on a non-navigable stream and on a navigable stream except that *the one is navigable and the other not*. The ownership of a shore owner upon a navigable stream *is only burdened by the public rights caused by the fact that it is navigable*. Upon principle, the rights of a shore owner upon a navigable stream should be the same as the rights of a shore owner upon a non-navigable stream, *subject only to the rights of the public*. There is nothing but the navigability of the stream to create any distinction in their ownerships. Accordingly, the Supreme Court of Wisconsin has from its earliest decisions held that the shore owner *has title in fee to the center of the stream*. Never once has it wavered in this holding. Neither the Supreme Court of Wisconsin nor the Supreme Court of Minnesota has ever held that the State has *any proprietary ownership in the bed of navi-*



*gable water*. Attention is now called to the Wisconsin decisions. It is thought best to let them speak for themselves and for the convenience of the court they are quoted quite extensively.

#### WISCONSIN CASES.

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*Jones v. Pettibone*, 2 Wis., 308 or 225.

This case clearly holds that where lands bordering upon streams of water which are meandered, surveyed and sold by the United States, the purchaser takes to the thread of the stream; if the stream be navigable, he takes subject to the public easement. At page 321 or 235 the Court clearly defines the right of the shore owner.

“The doctrine we suppose to be well established, that persons who are *bounded by the center or thread of the stream*, own the land under the stream, to their boundary. If the *stream is navigable in fact*, the public have the right to use it for the purposes of *navigation*, and the right of the owner is *subject to the public easement*. But, with this exception, the right of the owner to use the land as he pleases, is perfect.”



*Walker v. Shepardson*, 4 Wis., 486 or 495.

In this case the Court at page 507 or 509 says:

"This court has decided that riparian owners who are bounded on a stream above the ebb and flow of the tide, own the land to the center or thread of the stream, and that, where the stream is navigable, the land covered by it is subject to the right of the public to use the stream as a public highway for the passage of vessels employed in its navigation; but that for all other purposes the *right of the riparian owner to the use of the land covered by the water is perfect*. *Jones v. Pettibone et al*, 2 Wis., 308."

*Mariner v. Schulte*, 13 Wis., 693 or 775.

In this case the Court at page 705 or 789 says:

"This court has had occasion to consider somewhat the nature and extent of those rights, and has affirmed the general doctrine that purchasers of lands lying upon the banks of a stream above the ebb and flow of the tide, when bounded by the stream, are *presumed to run to the center of such stream*."



*Arnold v. Elmore*, 16 Wis., 510 or 536.

The Court says at page 515 or 541:

"After the former decisions of this court but little remains to be said upon the legal questions involved in these cases. For it must now be considered as the settled doctrine of this State, that purchasers of lands lying upon the banks of a stream, and bounded by the stream, *are presumed to run to the center of such streams unless the contrary intent appears.*"

*Yates v. Judd*, 18 Wis., 118 or 126.

In this case the Court at page 128 or 136 quotes with approval the following language from *Arnold v. Elmore* above:

"What stronger evidence could be afforded that the original proprietors of fraction 6, when they platted it, intended that the lots bounded by a highway or the river should extend to the center of the highway or river, subject of course to the public easement, without any reservation whatever, except where it was made for the proposed canal? This is the clear intention manifest from the plat and the record in the partition suit, and of course could not be removed by parol evidence."



*Wis. River Imp. Co. v. Lyons*, 30 Wis., 61.

In this case at page 64 the Court says:

"In this position the counsel appears to have been expressly overruled by the decision of this court in *Jones v. Pettibone*, 2 Wis., 319, 320, *where it was held that the purchaser from the United States in such case takes to the center of the stream. But the same question was before the Supreme Court of the United States and fully discussed and decided in Railroad Company v. Schurmeir*, 7 Wallace, 272, and the conclusions reached by that court were in some respects in conflict with the above decision made by this court. It was there held that under the operation of the laws of congress, the title of the purchaser to lands bordering on a navigable stream stops at the stream and does not extend to the center, but that he has the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as riparian proprietors of navigable waters, affected by the ebb and flow of the tide.

"But it was also held, in *Jones v. Pettibone*, that the title of the purchaser to the center of the stream was taken subject to the public easement or right of passage and navigation, and when the nature and extent of this easement or right are considered, it will be found for this purpose *to be almost or quite immaterial whether he is regarded as holding to the center of the river or only to the margin of it.*"



*Olson v. Merrill*, 42 Wis., 203.

At page 210 the Court says:

*"Whether the stream in this case be in fact navigable or not, the title to the bed of the stream is in the appellant, as owner of both banks. This has been the uniform rule of decision in this State from the beginning. Jones v. Pettibone, 2 Wis., 308; Walker v. Shepardson, 4 id., 486; Mariner v. Schulte, 13 id., 692; Arnold v. Elmore, 16 id., 509; Yates v. Judd, 18 id. 118; and other cases*

*"It is true that, in delivering the judgment of the court in Wis. R. I. Co. v. Lyons, 30 Wis., 61, Dixon, C. J., suggests that the rule established in Jones v. Pettibone, as applied to navigable rivers, was authoritatively overruled by Railroad Co. v. Schurmeir, 7 Wall., 272; and perhaps he intimates the same thing in Wright v. Day, 33 Wis., 260. It is also true that the view is expressed by the learned judge who delivered the opinion in Railroad Co. v. Schurmeir, and again by the learned judge who delivered the opinion in Yates v. Milwaukee, 10 Wall., 497, that riparian owners upon navigable streams take no title in the bed of the stream. But it is a little remarkable that the riparian owner's title in the bed of the stream was not involved in the judgment of the court, either in Railroad Co. v. Schurmeir, or in Yates v. Milwaukee, or in Wis. R. I. Co. v. Lyons, or in Wright v. Day.*

*"And, with great respect, we cannot but*



think that the chief justice's doubts arose from perhaps too strained and implicit a deference of that very able jurist to federal authority in state matters. None of the present members of this court share in those doubts. And, with all the deference to the authority of the federal supreme court which all state courts are bound to entertain, *we should be inclined to adhere to the settled rule in this State, even if that court had left us in doubt on the subject.*

*"But in the late case of Barney v. Keokuk, 4 Otto, 324, the true rule of jurisdiction on the subject is undoubtedly established by that court."*

*Delaplaine v. Railway Co.*, 42 Wis., 214.

At page 224 the Court says:

"In a number of decisions made by this court, it has been held that the proprietor of lands on navigable streams takes *usque ad filum aquae* as the boundary of his estate, subject to the public easement or right of navigation. It is not deemed necessary now to discuss or allude to the principles on which these adjudications rest; it is sufficient to say that this was the rule laid down in *Jones v. Pettibone*, 2 Wis., 308, decided in 1853, and the same doctrine has been often reaffirmed since. *Walker v. Shepardson*, 2 Wis., 384; *S. C.* 4 id., 486; *Mariner v. Schulte*, 13 id., 693; *Arnold v. Elmore*, 16 id., 510; *Harring-*



ton v. Edwards, 17 id., 586; Yates v. Judd, 18 id., 119. So far as the rights of the public are concerned, it is obvious that it makes little difference whether the riparian proprietor is regarded as holding to the center of the stream, or whether his title terminates at the margin thereof; because, in either case, the public has the right to improve, *regulate and control the bed of the stream and the flow of the waters therein, in the interest of navigation and commerce.* *Wisconsin River Improvement Co. v. Lyons*, 30 Wis., 62; *Arimond v. The Green Bay & Mississippi Canal Co.*, 31 id., 316. *The title of the riparian proprietor in the bed of the stream itself is subject to this power of the public over the stream, as in the case of an ordinary highway by land.* The question as to the ownership of the soil under the water, or in the bed of the stream, is one which each state is at liberty to determine for itself, in accordance with its views of local law and public policy; and if it chooses to concede the right of the riparian owner to the center of the stream, it is not for others to raise objections."

*Norcross v. Griffith*, 65 Wis., 599.

This case involves the construction of a deed of land on the shore of a navigable river, and at page 608 the court says:

"The result of these decisions is that in this State the owner of the bank of a navi-



gable stream, by purchase from the United States, is *conclusively presumed to be the owner of the bed of the stream in front of his purchase to the middle or thread thereof*; and under the same decisions the same presumption arises in favor of the owner of such bank in all cases, however such owner acquires his title; but the presumption in the case of owners not deriving their title directly from the government is not conclusive."

*Chandos v. Mack*, 77 Wis., page 573.

This case involves the question as to whether a small island situated between shore land and the thread of the Wisconsin river, a navigable stream, passed by the conveyance of the shore land. The Court holds that it did so pass, and at page 576 says:

"In this State the settled rule is that a grant by an individual of land which is bounded on a navigable stream vests in the grantee the title in the bed of the river to the thread of the stream, subject to the public right of navigation. The cases in this court where this doctrine has been laid down are numerous, but are so familiar to the profession that it is unnecessary to cite them. The precise question, however, here presented,—whether the title of an unsurveyed island between the shore and middle of the stream would pass to the purchaser,—has not been



directly decided; but we see no principle of law or good reason for holding that it would not so pass. The inference certainly is very strong, when the government leaves a small island in a navigable river, lying between the shore and middle of the stream, unsurveyed, and sells all the surveyed islands and all the lands on both sides of the river, that it intends to abandon all right to such unsurveyed island and let it pass to the riparian owners of lands on the river as an incident to its grant. It seems formerly to have been the policy of the government to survey islands omitted from the general survey, and sell them, but, from a letter of the acting commissioner of the general land office, which was introduced on the trial, it appears that this practice has been abandoned because it was found disadvantageous to the public interest, and applications for such surveys are no longer entertained. This item of evidence gives additional strength to the inference as to the effect of the grant itself from the government,—that, where no right is reserved, the grant of lands on the bank of the river vests in the purchaser the title of any unsurveyed islands lying between the main land and the center of the stream, since the government no longer desires to assert any interest to an island thus situated and omitted in the original survey.”



*Willow River Club v. Wade*, 100 Wis., 86.

In this case the Court holds that the title to the bed of the navigable stream is in the riparian owners; that the right to fish in such stream is a right common to the public, and one who keeps within the limits of a stream may exercise such right without being guilty of trespass. The only, if any, importance that attaches to this decision is contained in the independent opinion of Justice Marshall. This opinion is somewhat long and discursive, one in which the justice attempts to clear up the question of the ownership of the shore owner and of the State in the beds of navigable waters in the State of Wisconsin. He closes his opinion by saying at page 117:—

“To recapitulate in closing, the title to the beds of all navigable waters in this State was in the State originally in trust for public purposes, the same as the beds of streams navigable at common law; the State not only never has, but never can, legally abdicate that trust, or surrender such title, except subject to all the public uses for which it was created; and *while it is true that the title to the beds of such streams is in the adjoining landowners by implication of law, it is just as true that such title is subject to the public character of the waters, the same as if no surrender of title had ever taken place.* The public right of navigation, and the pub-



lic right of fishing, both exist in such streams, each independent of the other, with the right to make the usual use of the beds of such streams within the margins thereof, necessary to full enjoyment of such public rights."

*Abbott v. Cremer*, 118 Wis., 377.

This is an ice case in which the court says:—

"It is the settled law in this State that the title to the beds of streams is vested in the riparian owners. \* \* \* It is also established that the title to ice forming on ponds is in the person owning the soil."

*Franzini v. Layland*, 120 Wis., 72.

This case involves the question of boundaries of land located upon the Mississippi River. The Court at page 81 says:—

"Appellants' counsel further contend that the rule which generally prevails in this State, that a riparian proprietor of land bounded by a river not navigable takes absolutely to the center of the stream, and on a navigable river, to the center thereof by such a qualified title as will not violate the public rights which were designed to be preserved to the people in the transfer of the submerged territory to the State, should not apply to large rivers like the Mississippi. No authority is cited to support such contention, and we ven-



ture to say that none exists. The authorities are distinctly to the effect that no discrimination can reasonably be made on account of the size of rivers. \* \* \* This State, by judicial authority so long acquiesced in as to become a rule of property, quite early established as its policy the doctrine that the title to a riparian proprietor upon a navigable stream goes not by force of his patent, whether received from the government or from the state, but by the mere favor or concession of the state to the center of the stream, subject to all those public rights which were intended to be preserved for the enjoyment of the whole people by vesting the title to the beds of such streams in it in trust for their use. \* \* \* Whether such policy be out of harmony with the original design, or whether it was the best one to establish, cannot now be a subject for judicial consideration. *There is no opportunity now for retreat. The State has taken its position, and property rights upon all our rivers have become vested with regard thereto, and the supreme judicial authority has many times affirmed that it possesses discretionary authority to part with its trust property to the extent mentioned,—that is, in such ways as do not substantially affect the purposes of the trust.* \* \* \*

“The rule above stated must necessarily be modified as regards riparian proprietors upon a stream forming a boundary between two states, where the dividing line of jurisdiction is the center of the main channel of



such stream, since the state cannot clothe a person with *any interest in land beyond its boundary*; and the same reason that occasions the concession to a riparian proprietor upon a navigable stream wholly within its boundaries, to the thread of such stream, requires the concession *to go to such dividing line* where the riparian proprietor is upon a navigable boundary river, regardless of whether such line be nearer to or further from his *shore than the filum aquae of the stream*. So we find it held in the books that such is the case even where the boundary line of a state divided from another by a navigable river is at low water mark on the opposite shore."

*Walls v. Cunningham*, 123 Wis., 346.

This case relates to boundary of land situated upon a navigable river, and the Wisconsin Court again holds that such land is bounded by the thread of the stream.

At page 348 the Court says:

"The first proposition presented, though it is not distinctly stated, is that the finding that the lands of the parties were adjoining lands within the statutes on the subject of division fences, is wrong. Authority is cited to show that one deemed to be the owner of the bed of a navigable stream to the center line thereof on one side as incident to ownership of the shore on that side, may convey



the bank so as to sever title thereto from the bed, putting the ownership of the latter in one and of the former in another. *Norcross v. Griffiths*, 65 Wis., 599, 27 N. W. 606. The principle contended for is sound, but the evidence here supports the trial court's view that no such severance was accomplished. The owner of the bank of a stream presumably owns the bed thereof to the thread of such stream subject to public rights. Some clear evidence to the contrary in any case is necessary to rebut that presumption."

*Sliter v. Carpenter*, 123 Wis., 578

This case relates to the question of boundary of land located upon a navigable river, and restates the Wisconsin rule upon that subject. At page 580 the Court says:

"It was held in *Chandos v. Mack*, 77 Wis., 573, 46 N. W. 803, that a grant of lands on the bank of a navigable stream, made without limitation or reservation as to the adjacent islands, vests in the purchaser the title to any unsurveyed island lying between the bank and the thread of the stream. This ownership is predicated upon the ground that the riparian proprietors in this State, by concession of the State, the owners of the river bed adjoining their land to the thread of the stream, and that this ownership extends to any island or dry land which may be formed thereon."



*Farris v. Bentley*, 141 Wis., 671.

In this case the Court again states and holds the rule to be that such land is bounded by the thread of the stream.

At page 674 the Court says:

“It is settled in this State that where the state or nation makes a patent, without reservation, of lands on a navigable stream, the patentee takes title by favor or concession of the state to the center of the stream midway between banks, regardless of the navigable channel, subject to the rights of the public in the stream; and that he also takes title to any unsurveyed island included with such limits. *Chandos v. Mack*, 77 Wis., 573, 46 N. W. 803; *Sliter v. Carpenter*, 123 Wis., 578, 102 N. W. 27. The rule is necessarily modified in the case of a river which forms the boundary line between states because the boundary line in such cases is the center of the main or navigable channel. *Franzini v. Layland*, 120 Wis., 72, 97 N. W. 499. It is equally well settled that where the United States grants lands bounded by streams and makes no reservation or restriction, the grant will be given effect according to the law of the States in which the land lies (*Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838); and where according to such local law the title extends to the middle of the stream and includes an unsurveyed island, the United State in which the land lies (*Hardin v.*



survey and patent to another, in the absence of a showing that the island was left unsurveyed by fraud or mistake.”

*Kelley v. Salvas*, 146 Wis., 543.

In this case the Court again maintains the Wisconsin rule to be that lands bordering on a navigable river are bounded by the middle thread of the stream or the middle of the main channel. At pages 547 and 548 the Court says:

“The appellant contends that the plat having given lot 8 the bank and a water front, this fixed the east boundary of that lot in the middle of the channel of the Fox river and subject to the usual incidents of riparian ownership of the bed of the stream. He contends that Water street, never having been opened as a street, does not exist as a street, and in any event its presence on the plat would not affect the true eastern boundary of lot 8, but that that boundary would, notwithstanding the delineation of Water street on the plat, extend as aforesaid. We think this fails to give due weight to the rule that the owner of lands bordering upon a navigable stream and who owns the bed of the stream in front of his lands may separate the ownership of the lands including the bank of the stream from the ownership of the bed of the stream, and convey the shore and bank to one grantee, and the bed



of the stream to another. *Norcross v. Griffiths*, 65 Wis., 599, 27 N. W. 606; *Walls v. Cunningham*, 123 Wis., 346, 101 N. W. 696; *Minneapolis T. Co. v. Eastman*, 47 Minn., 301, 50 N. W. 82, 390; *Hanford v. St. P. & D. R. Co.*, 43 Minn., 104, 44 N. W. 1144; *Eldridge v. Cowell*, 4 Cal. 80; *Gilbert v. Emerson*, 55 Minn., 254, 56 N. W., 818; *Concord Mfg. Co. v. Robertson*, 66, N. H., 1, 25 Atl. 718, 18 L. R. A. 679; 3 *Farnham, Waters*, 724, P. 2194, and cases."

This case has been decided in the Supreme Court of Wisconsin since the case at bar was decided by the trial court.

*State v. Bowen*, 149 Wis., 203.

This case has to do with the State boundary upon a navigable river, but everything that it decides bears with equal force upon, and is equally applicable to, the question of the boundary of private owners upon navigable rivers. At pages 205 and 206 of this case the Court says:

"The district attorney of La Crosse county relies upon the cases of *Franzini v. Layland*, 120 Wis., 72, 97 N. W. 499, and *Iowa v. Illinois*, 147 U. S., 1, 13 Sup. Ct. 239, to sustain the contention that the boundary changed with the change of channel. Those cases establish the rule that within the limits



of the main channel the boundary follows the mid-channel or thread of the stream as it changes from time to time owing to the gradual shifting of sand banks, or other causes. But they do not hold that the creation of a new and different main channel shifts the boundary from the old to the new. And such is not the law. For the purpose of determining the boundary between states where that is declared to be the center line, or thread, or middle of the main channel of a stream separating them, *the conditions existing at the time of their creation govern as to what channel is meant. The then main channel, except as it may be changed by erosion or accretion, will forever contain within it the declared boundary line, though not necessarily in the same place at all time.* Nebraska v. Iowa, 143 U. S., 359, 12 Sup. Ct. 396; Missouri v. Nebraska, 196 U. S., 23, 25 Sup. Ct. 155; Washington v. Oregon, 211 U. S., 127, 29 Sup. Ct. 47; S. C. 214 U. S. 205, 29 Sup. Ct. 631; 1 Farnham, Waters, Sec. 7f, p. 40; Gould, Waters, Sec. 159."

This case also has been decided since the decision of the case at bar by the trial court. It was decided on March 16th, 1912, and seems to be the last decision of the Wisconsin court upon the subject.

From these decisions it appears that appellant Whiteside is the owner in fee of the land in



question, which lies to the south of the main channel of the stream, which is the boundary line between the State of Wisconsin and the State of Minnesota. Even if the State of Wisconsin, the State of Minnesota, and the United States should join in changing the boundary of the States of Wisconsin and Minnesota, which is the only way in which the boundary line can legally be changed, *that would not and could not take from appellant Whiteside his ownership in the land in question.* If he is to be deprived of this ownership, it must be by due process of law and upon just compensation. That he owns under the Wisconsin law *there can be no question.*

The rule in Minnesota does not differ from the rule in Wisconsin except in phraseology, which at first glance appears like a difference in principle, but upon inspection and consideration is found to be only a difference in terminology. The Supreme Court of Wisconsin and the Supreme Court of Minnesota in reality state the same thing, but state it in different words. In the earliest case in Minnesota, *Schurmeier vs. St. Paul & Pacific R. R. Co.*, 10 Minn., 59 or 82, Chief Justice Wilson uses this language in the opinion:

“Some—we believe most—of the authorities that deny that the riparian proprietor owns to the middle thread of the stream, hold



that he takes to the low water mark. \* \* \* This, we think, would include the land claimed by the defendant, and designated 'Island No. 11.' We hold, therefore, that by the patent to Roberts, the United States conveyed to him said 'island.' \* \* \*

"We think no reason can be given why the same rule should not apply to grants made by the government that are applicable to grants made by individuals. Section 9, of the Acts of Congress, first above cited, provides that all navigable rivers within the territory to be disposed of by virtue of that act, shall be deemed 'to be and remain public highways.' At common law rivers navigable in fact are public highways, and the riparian owner holds subject to the public easement. This Act of Congress therefore, is merely a declaration or affirmance of the common law, and not a modification of it. *The fact that these rivers are, and must remain, public highways, is not at all inconsistent with the view, that riparian owners have the fee of the bed of the stream.*"

It will be seen from the language quoted from this decision that the court does not hold that the boundary of lands upon navigable water is fixed at the low water mark, but that the idea in the mind of the court was that the shore owner had the fee to the thread of the stream, *subject to the right of the public* in the stream as a public high-

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way. It appears from this case that it varies in no material respect from the earliest case in Wisconsin, cited above:

Jones v. Pettibone, 2 Wis., 208 or 225.

In the opinion of the court written by Justice Mitchell in the case of *Union Depot, etc., v. Brunswick*, 31 Minn., 297, Justice Mitchell says:

“Neither is it material whether, in exercising these riparian rights, the property is made available and useful by building piers, and landings of wood or other material, or, as is the usual, and often the only practical, way on the Mississippi and its tributaries, by reclaiming the land by artificial filling with earth out to the requisite depth of water. Whether *the fee* in this ‘made land’ would be in the state or in the riparian owner—that is, whether it partakes of the nature of the bed of the stream upon which it is made, or of the shore to which it is added—may be a question of *speculative interest*, but it is not one of *any practical importance*. If *the fee* be in the riparian owner, yet, of course, it must be a *qualified fee*; that is, *subject to the paramount right of public navigation*. But if it be in the state, the riparian owner still has, subject to this same public right, the exclusive right of possession and the *entire beneficial interest*. Hence, the



determination of the question one way or the other would not affect the value of the riparian owner's interest in the property, or the amount of compensation he is entitled to."

It appears from this decision again that there is no real divergence between it and the decision of the *Schurmeier case* or in *Jones v. Pettibone* above. Apparently the fixing of the boundary of the shore owner's land at low water mark is practically a legal fiction. For these decisions clearly show that the shore owner has *valuable rights to and interests in the bed of the stream beyond low-water mark*, which the court designates in a speculative way as a "qualified *fee interest*, "subject to the paramount right of public navigation." The court further says that no matter how this interest may be defined, the shore owner "has, subject to the same public right, the exclusive right of possession and the *entire beneficial interest*."

It will serve no useful purpose to go extensively into the consideration of Minnesota cases. Judge Morris of the trial court has fully considered and analyzed the Minnesota cases in this case and in the case of *Hobart v. Hall*, 174 Federal, 433, and the Circuit Court of Appeals has



considered the Minnesota cases in *Hobart v. Hall* on appeal. In the case at bar of course the Wisconsin decisions control, and attention has been called to the Minnesota cases only because it is sometimes assumed that there is a marked variance between the principle underlying the Wisconsin and the principle underlying the Minnesota cases. It is thought that this variance does not exist.

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Solicitors and of Counsel for Appellee.



NORTON, EXECUTOR, *v.* WHITESIDE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT.

No. 55. Argued November 4, 5, 1915.—Decided November 29, 1915.

A mere formal statement in the bill to the effect that the cause of action is one arising under the Constitution and laws of the United States does not suffice to give this court jurisdiction to review the judgment of the Circuit Court of Appeals under § 241, Jud. Code—it must appear that the suit really and substantially involves a dispute or controversy respecting the validity, construction or effect of some law of the United States upon the determination whereof the result depends. *Hull v. Burr*, 234 U. S. 712.

Riparian rights attaching to property patented by the United States are determined by the law of the State in which the land is situated. *Hardin v. Jordan*, 140 U. S. 371.

The fact that both parties owning parcels of real estate bordering on a navigable boundary river opposite to each other acquired the property from the United States does not change or affect the rule that riparian rights of the parties are to be determined by the law of the respective States in which the properties are situated.

The provisions in the various ordinances and statutes relating to the organization of the Northwest Territory referred to in the bill in this case do not control the riparian rights enjoyed, under the law of the State wherein the property is situated, by parties who acquired the land from the United States within the limits of a State carved out of such Territory.



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Averments in a bill as to the general intent of Congress to preserve free navigation of the rivers within the Northwest Territory are unavailing to give jurisdiction to this court to review a judgment of the Circuit Court of Appeals in a case otherwise made final by § 128, Jud. Code, in the absence of any specific legislation of Congress influencing the determination of an asserted Federal question in regard to riparian rights.

The mere fact that Congress directed the improvement of a new channel in a navigable river does not destroy riparian rights existing under state law and create new ones under Federal law.

In this case as the riparian rights asserted by complainant existed, if at all, under the law of the State in which the property is situated and the determination of the issues did not involve the construction of the Constitution or of any law of the United States, but as the jurisdiction rested on diverse citizenship alone, the decree of the Circuit Court is final under § 128, Jud. Code, and this court has no jurisdiction to review it under § 241, Jud. Code.

Writ of error to review, 205 Fed. Rep. 5, dismissed.

THE facts, which involve the jurisdiction of this court under § 241, Judicial Code, to review a judgment of the Circuit Court of Appeals, and the finality of such judgment under § 128, Judicial Code, are stated in the opinion.

*Mr. Jed L. Washburn*, with whom *Mr. William D. Bailey*, *Mr. Oscar Mitchell*, and *Mr. Albert C. Gillette* were on the brief, for appellant.

*Mr. Luther C. Harris* and *Mr. Alfred Jaques*, with whom *Mr. Theo. T. Hudson* was on the brief, for appellee Whiteside.

*Mr. Daniel G. Cash* and *Mr. John B. Richards, Jr.*, for appellee Tallas, submitted.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The appellant, who was complainant below, as the owner of certain shore land abutting on a stretch of water



in or near the upper end or far corner of Lake Superior, from one point of view sued to quiet his title to the whole or a part of a certain island which had emerged from the waters in front of his land, or considered from the same point of view in a broader aspect, to protect his asserted riparian rights in the submerged land in front of his shore property. The defendants who are appellees were owners or possessors either of property on the opposite shore or of the whole or part of the emerged island, and the controversy resulted from a difference between the parties as to the character and extent of their riparian rights and as to the ownership of the island which had emerged in the stretch of water between the two shores. The District Court upheld the theory of the existence in the complainant of the riparian rights asserted by him and therefore awarded relief upon that basis except as to a portion of the emerged island as to which it gave no relief because in consequence of adverse possession by one of the defendants, it was considered there was an adequate remedy at law and consequently no right to equitable relief. 188 Fed. Rep. 356. On appeal the court below, not approving the full character or extent of the riparian rights asserted by the complainant and recognized by the trial court, reversed with directions to dismiss the bill (205 Fed. Rep. 5), and it is in consequence of an appeal from that decree that the case is now before us.

A motion to dismiss upon the ground that the decree appealed from is beyond our competency to review because made final under § 128 of the Judicial Code (36 Stat. 1133, c. 231) requires to be disposed of. To test its merits we must first ascertain whether the jurisdiction of the District Court was invoked solely on the ground of diverse citizenship. *St. Anthony's Church v. Pennsylvania R. R.*, 237 U. S. 575, 577, and cases cited. That taking the face of the bill from the point of view of mere form of statement, diverse citizenship was not the only ground



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of jurisdiction relied upon is apparent since the bill besides diversity of citizenship alleged that the cause of action was one arising under the Constitution and laws of the United States. This, however, does not suffice to solve the question since it is settled that a mere formal statement to that effect is not enough to establish that the suit arises under the Constitution and laws of the United States but that it must appear that "it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading. . . ." *Hull v. Burr*, 234 U. S. 712, 720, and authorities there cited. Before coming to the text of the complaint, to understandingly test whether it fulfills these requirements we give the merest outline of the condition out of which the controversy grew and to which the complaint related.

The boundary line of Wisconsin under its enabling act, starting from a designated point, ran "through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same," etc. And the boundary line in one respect of Minnesota from the point where it intersected with the St. Louis River followed the main channel of that river "to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British Possessions." From the point of intersection where it first becomes the boundary of the States of Wisconsin and Minnesota, in its flow towards Lake Superior, the St. Louis River approaches Lake Superior in the direction of a large bay or indentation therein. From one point of view the river at once leaving the fast land empties into and is immediately absorbed in this bay. From another



the river before it empties into the lake expands into a stretch of shallow water contained within the north or Minnesota shore upon which is Duluth and the south or Wisconsin shore upon which is the City of Superior, through which shallow stretch a tortuous but navigable channel curvingly continues to flow until by a passage through an intervening bar the river emptying into the bay merges its existence with that of the lake. We say tortuous channel because the banks on either side of the flange-like stretch of water are not symmetrical, but are indented with various bays of divergent shape and expanse, and the water itself is irregularly interspersed with islands or flats which deflect the channel we have described and cause it greatly to meander as it proceeds to its ultimate destination in the bay through the bar in question. It will thus be seen that the difference between the two points of view is this, that one treats the lake as embracing the expanded though shallow stretch of water in question, and the other considers the shallow stretch of water as a part of the river until the point is reached where, traversing the bar, the lake and river are completely and beyond room for any possible question united.

On the Minnesota or north shore of this shallow stretch of water the complainant owned land. The channel flowing through the stretch of water as it approached the complainant's land curved towards the Minnesota shore and therefore in passing in front of that land was nearer the north or Minnesota shore. In the stretch of water nearly opposite the complainant's land, but over towards the south or Wisconsin shore there was a large island known as Big Island, admittedly in the State of Wisconsin, owned by Whiteside, one of the defendants, and about two thousand feet lay between the outer shore of this island and the complainant's land on the northern shore. In the intervening space between the channel and this



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island, and therefore on the south or Wisconsin side of the channel, there gradually emerged a smaller island.

It having been determined to improve the navigation in the channel through the stretch of water in question, the plans to accomplish that purpose were approved by the Secretary of War in 1899, and in virtue of an appropriation by Congress the work under the plans was carried out by the United States between the years 1899 and 1902. It is not necessary for the elucidation of the averments of the bill to do more than say that the carrying out of this work resulted in the creation of a new navigable channel which in passing through the stretch of water instead of swinging towards the north or Minnesota shore in front of the complainant's land curved in the other direction and therefore approached nearer the Wisconsin shore than did the old channel. In doing so it consequently reached or struck the emerged island of which we have spoken near its Wisconsin or south side, and cutting through it virtually put the new and enlarged channel on the Wisconsin side of such emerged island. What remained of the island thereafter hence lay between the newly created channel and the lands of the complainant on the north or Minnesota shore. In other words, as the result of the creation of the new channel the lands of the complainant to the extent that the emerged island accomplished that result, were separated from the new channel. In the performance of the work it may be conceded that in cutting through the emerged or small island the excavated earth was largely dumped on the surface of the island towards the Minnesota shore and that either because of the washing of this earth into the old channel or the sedimentary deposit caused by the slackening of the velocity of the water flowing through it, the old channel opposite the land of the complainant became not suitable for, or more difficult of, navigation.

In view of this situation we come to consider the bill,